Office Supreme Court U. S.
FILED
DEC 1 1899
JAMES H. McKENNEY,
Clerk.

No. 108.
Brief of Turner, Burry & Herrick for P.

Filed Dec. 1, 1899.

IN THE Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 108.

THE FARMERS' LOAN AND TRUST COMPANY,
Plaintiff in Error,
vs.
THE LAKE STREET ELEVATED RAILROAD COMPANY, THE AMERICAN TRUST AND SAVINGS BANK and THE NORTHERN TRUST COMPANY,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HERBERT B. TURNER,
WILLIAM BURRY,
JOHN J. HERRICK,
SOLICITORS FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

No. 108.

THE FARMERS' LOAN AND TRUST COMPANY,
Plaintiff in Error,
vs.
THE LAKE STREET ELEVATED RAILROAD COMPANY, THE AMERICAN TRUST AND SAVINGS BANK and THE NORTHERN TRUST COMPANY,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

STATEMENT.

This is a writ of error brought to review a judgment of the Supreme Court of Illinois, affirming a decree of the state Circuit Court removing the plaintiff in error, as trustee, under a mortgage made by defendant in error, the Lake Street Elevated Railroad Company, to the plaintiff in error and the defendant in error, the American Trust and Savings Bank, as co-trustees, to secure an issue of its bonds, and perpetually enjoining the plaintiff in error from further prosecuting a suit to foreclose the mortgage which it had brought in the United States Cir-

cuit Court, and otherwise acting as trustee. (Pr. Rec., 9.)

The bill on which the decree was rendered was filed by the defendant in error, the Lake Street Company, and named as defendants, the plaintiff in error and the other defendants in error, the American Trust and Savings Bank, the co-trustee, and the Northern Trust Company described "as the holder of over 6,500 of the bonds." (Pr. Rec., 9.)

On the filing of the bill, the state court issued an *ex parte* preliminary injunction, enjoining plaintiff in error from prosecuting the suit it had brought in the Federal Court. (Pr. Rec., 9, 420.) Plaintiff in error then filed a petition and bond for the removal of the case to the United States Circuit Court (Pr. Rec., 31-34), and the removal having been denied by the state court (Pr. Rec., 36), filed a transcript of the record in the United States court, and that court entered an order docketing the cause. (Pr. Rec., 532.)

The defendants in error thereupon entered their appearance in the United States court and made motions to remand the case to the state court (Pr. Rec., 533, 538), and on full argument the United States court overruled the motions. *Lake Street El. R. Co.* v. *Farmers' Loan & Trust Co.*, 72 Fed. R., 804. (Pr. Rec., 545.)

That court also entered an order, modifying the preliminary injunction issued by the state court, so as to allow the plaintiff in error to file an amended bill in the foreclosure suit, and subsequently an order dissolving the injunction. (Pr. Rec., 545, 548.)

On the entry of the order overruling the motions to

remand, defendants in error returned to the state court and pressed the case to an immediate hearing in that court, and a final decree was entered, as stated, which the state Supreme Court affirmed. (173 Ill., 439; Pr. Rec., 603.)

The sole ground on which the state Supreme Court held that the United States court did not acquire jurisdiction was, that plaintiff in error was not named as an obligor in the bond presented with the petition, and did not sign it as such. (173 Ill., at 449; Pr. Rec., 606.)

At the last term of this court, a motion was made by the defendants in error to dismiss the writ of error or affirm, and the motion having been submitted on printed suggestions in support of and in opposition to it, was reserved to the hearing on the merits.

The particular grounds on which the court is asked to review the judgment of the state court—covered by the assignments of error—are as follows:

1. The ruling of the state Supreme Court, that, by reason of the fact that the petitioner, the Farmers' Loan and Trust Company, was not named as one of the obligors in, and did not sign the bond presented and filed with the petition for removal, the Federal court did not acquire jurisdiction, was erroneous.

2. That in the view that the case only involved a single controversy, the defendants in error, the American Trust and Savings Bank and the Northern Trust Company, were not indispensable or even necessary parties to the controversy, and, if they were, they should not be ranged on the same side of the controversy with the plaintiff in error, and the case was therefore properly removed to the United States court.

3. That there were in fact two or more separable controversies, which could be fully determined as between the complainant, the Lake Street Company, and the defendant, the Farmers' Loan and Trust Company, plaintiff in error here, citizens of different states, without the presence of the other defendants, the American Trust and Savings Bank and the Northern Trust Company.

4. The bill was brought for the purpose of enjoining, by an injunction issued out of the state court, the further prosecution in a court of the United States of a suit previously brought in that court by the plaintiff in error, under the authority of the constitution and the laws of the United States, and therefore involved a Federal question, entitling the plaintiff in error to remove the case to the United States court.

5. The decision of the United States court on the motions to remand was an adjudication of the Federal question as to whether the cause was removed to the United States court, made on the motions of defendants in error submitting the question to that court for its decision, and the state court erred in proceeding further in the case after that adjudication had been brought before it by proper pleadings and proofs.

6. The decree of the state trial court, perpetually enjoining the further prosecution of the foreclosure suit pending in the United States court, and of which that court had acquired jurisdiction before the filing of the bill in this case, was without jurisdiction, and in violation of the right of the plaintiff in error, under the constituton and laws of the United States, to bring and prosecute the suit in the courts of the United States, and the action of the state Supreme Court, affirming the decree, is reviewable in this court by writ of error.

The bill made the following allegations:

(1) That the complainant made a mortgage, conveying its property and franchises to the plaintiff in error and the defendant in error, the American Trust and Savings Bank, as trustees, to secure an issue of its bonds, and that the total number of bonds issued under the mortgage was 7,574, of the par value of $1,000 each, making the total mortgage indebtedness $7,574,000. (Pr. Rec., 5-7.)

(2) That the complainant was unable to earn the money to pay its interest and was in default in the payment of two installments of interest, due respectively July 1, 1895, and January 1, 1896. (Pr. Rec., 7, 8.)

(3) That on account of these defaults, the holders of 610 of the bonds made a demand in writing on the two trustees to take action to enforce the mortgage for the payment of interest by filing a bill to foreclose (Pr. Rec., 7), and that the complainant had filed a bill in the state Circuit Court, enjoining the trustees "from taking any action or proceeding to foreclose said mortgage *under the request or demand made by* holders of 605 of said 610 bonds." (Pr. Rec., 7.)

(4) That the holders of 6,574 bonds did not join in the demand to foreclose, but, on the contrary, "especially requested" the trustees "to take no action whatsoever under said mortgage or trust deed with reference to the failure of said company to provide for or pay" the two instalments of overdue interest. (Pr. Rec., 8.)

(5) That the plaintiff in error, one of the trustees, by its agent, declared that, "notwithstanding that no other person was asking or demanding of said The

Farmers' Loan and Trust Company any action or proceeding on behalf of the bondholders than said 610 bonds, it proposed to and would file a bill to foreclose the said mortgage for failure to pay the interest upon bonded indebtedness aforesaid." (Pr. Rec., 8.)

(6) That the other trustee, The American Trust and Savings Bank, "in compliance with such request" of the holders of 6,574 bonds, "did decline and refuse to join with said The Farmers' Loan and Trust Company in any proceedings whatsoever to enforce the provisions or conditions of said mortgage on account of the failure of your orator to pay the said interest as aforesaid." (Pr. Rec., 8.)

(7) That "notwithstanding the parties," etc., holding the bonds, "have made no demand or request to take any action or proceedings" other than said 610 bonds, "yet said The Farmers' Loan and Trust Company, in violation of its duty and for the purpose of injuring and destroying the property and assets of your orator, intends to and will, unless restrained by this honorable court, proceed to take possession of, *or attempt to* foreclose said mortgage or trust deed, as aforesaid." (Pr. Rec., 8.)

(8) That at the time the mortgage was made, the plaintiff in error, being a corporation of New York, "had not," nor "has it since, complied with the laws of the State of Illinois requiring the deposit with the auditor of public accounts, for the benefit of the creditors of said company, of the sum of $200,000" in stocks, bonds or mortgages on real estate, and that since its acceptance of the trust, plaintiff in error has been doing business in Illinois "without having made the deposit as required by the laws of the State of Illinois." (Pr. Rec., 6.)

(9) That "it is the desire and wish of the holders of over 6,500 of the bonds of your orator [The Northern Trust Company], issued under and by virtue of said trust deed as aforesaid, that The Farmers' Loan and Trust Company should be removed from its position as trustee under said mortgage, *first*, for failure to comply with the laws of the State of Illinois, and, *second*, for assuming to act or take proceedings under said mortgage contrary to and in violation of the request of the holders of the majority of the bonds issued under said mortgage." (Pr. Rec., 8, 9.)

The bill made defendants the plaintiff in error and its co-trustee, the American Trust and Savings Bank and the Northern Trust Company, describing the latter as "the holder of over 6,500 bonds." (Pr. Rec., 9.)

The bill prayed "that a new trustee may be appointed by the court" "in place and instead of" the plaintiff in error, that "an injunction *pendente lite*" be issued, enjoining the plaintiff in error from "taking any proceeding or bringing *or prosecuting* any suit or suits or acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust, and that upon the final hearing hereof said injunction may be made perpetual," and for general relief. (Pr. Rec., 9.)

On the same day that the bill was filed, but prior to the time it was filed, the plaintiff in error had filed in the United States Circuit Court a bill to foreclose the mortgage for the defaults in interest, alleging the refusal of the co-trustee to join, and the process thereon had issued. (Pr. Rec., 255, 299-300.)

On the filing of the bill in this case a preliminary in-

junction was issued by the state court, without notice to plaintiff in error, enjoining it, as prayed in the bill, "from taking any proceeding or bringing *or prosecuting* any suit," etc., "or acting in any manner" under the mortgage. (Pr. Rec., 9-11, 420-421)

The petition for removal filed by plaintiff in error, (Pr. Rec., 31–33) set up as grounds for removal:

(1) That there were two or more controversies in the suit between citizens of different states, the complainant a citizen of Illinois, and the plaintiff in error a citizen of New York.

(2) That if the controversy in the suit was one and inseparable, nevertheless such controversy was wholly between citizens of different states—the complainant a citizen of Illinois and the plaintiff in error a citizen of New York—and that the other defendants, the Northern Trust Company and the American Trust and Savings Bank, were not necessary parties to the controversy.

(3) That there was in the suit a controversy arising under the laws of the United States by reason of the injunction against the prosecution of the suit which plaintiff in error had brought in the United States court.

The bond filed with the petition was conditioned as required by the removal statute, and was signed by two obligors, as to whose sufficiency no question has been made, but the petitioner was not named as an obligor, and did not sign it. (Pr. Rec., 33-34.)

The state court having denied the removal (Pr. Rec., 36), the plaintiff in error filed a transcript of the record in the United States court, and an order was entered in that court giving leave to file the transcript and that the cause be docketed. (Pr. Rec., 532.)

All the defendants in error thereupon entered their appearance in the United States court, and filed motions to remand the case to the state court, and after a full hearing the United States court denied the motions and entered an order accordingly. (Pr. Rec., 545.)

That court, after a hearing, also entered an order modifying the injunction issued by the state court, so as to allow plaintiff in error to file an amended bill in the foreclosure suit it had brought, and subsequently a further order dissolving the injunction. (Pr. Rec , 545, 548.)

The order overruling motions to remand was entered March 16, 1896, and on the day following, March 17, 1896, an order was entered by the United States court, setting the motion to dissolve the *ex parte* injunction which had been issued in the case, for hearing on March 26, 1896. (Pr. Rec., 546.) Immediately following this action of the United States court and on March 18th (the day fol lowing the *order setting the motion to dissolve for hearing*) the complainant the Lake Street Company returned to the state court and made a motion in the state court to attach the attorney for the plaintiff in error for contempt in violating the injunction in taking steps in the foreclosure case, viz: filing the amended bill. (Pr. Rec , 45.)

As a consequence of this action, and on the same day (March 18), the Farmers' Loan and Trust Company filed a special appearance in the state court, and moved to quash the service in the case and limiting its appearance to that purpose. (Pr. Rec., 38.) *On the same day*, a motion was made by the counsel to strike this motion and appearance, from the files, and thereupon the state court, *on the same day*, entered an order finding that " " *it has jurisdiction of the parties and subject-matter*

hereof," and that the motion and appearance " was *improperly and improvidently filed*, and ordered that it be *stricken from the files.* (Pr. Rec., 45-46.)

To prevent a default, the plaintiff in error then applied for leave to enter a general appearance and for time to answer, which the court granted, only " *on the condition* " that it " answer the bill of complaint herein before 10 o'clock A. M. of Wednesday, *March 25*, 1896 " (*within a week*), and the appearance having been entered, a rule was made *requiring it to answer by that date.* By the same order, the hearing of the motion *to attach for contempt was set for March 25*, 1896 (the same day on which it was required to answer, and the day *before* that on which the motion to dissolve had been set for hearing in the United States court).

The answer of the plaintiff in error having been filed within the week required (March 25th) the court thereupon set the case down for a final hearing on May 8th—*a little more than a month after the filing of the answer.* Meanwhile, plaintiff in error, by leave of court, filed an amended answer. (Pr. Rec., 49–70.)

In its amended answer plaintiff in error protested that the state court did not have jurisdiction, and that the case had been removed to the Circuit Court of the United States. (Pr. Rec., 53-54.) It also set up the proceedings in the United States Circuit Court docketing the cause and its orders on the motion to remand, and insisted that by reason of the action of the complainant and of the court there shown the state court should not proceed with the case of plaintiff in error. It also denied the different charges made against it in the bill.

Notwithstanding these protests and objections of

plaintiff in error, the state court proceeded with the final hearing on the date set, May 8th, all of the evidence being taken in open court.

The record shows that on the hearing, both the Northern Trust Company and the American Trust and Savings Bank appeared by their counsel and acted in conjunction and co-operation with the complainant, as we shall show more fully hereafter.

In the course of the hearing plaintiff in error gave in evidence a transcript of the proceedings in the United States court. (Pr. Rec., 532–546, 548.)

On May 28th the State court made its findings in favor of the complainant, and on June 4th entered a final decree in the case. (Pr. Rec., 71.)

The case was thus brought by the state court to a final hearing and decree *within a little more than a month after the filing of the answer of plaintiff in error, and before, under the rules of the Federal court, even the evidence could be taken, much less a final hearing had.*

The decree of the state court, after finding that the court had "jurisdiction of all parties hereto and of the subject-matter hereof," decreed that plaintiff in error be removed as trustee; that it be perpetually enjoined from prosecuting the foreclosure suit in the United States Court, or from taking any other action as trustee, and that the American Trust and Savings Bank, the co-trustee, appoint a successor. (Pr. Rec., 98-99.)

On appeal from this decree to the state Appellate Court, the decree was affirmed in that court, and on appeal to the state Supreme Court it was affirmed there, both courts holding, contrary to the decision of the United States Circuit Court, that the case was not properly removed to

the United States court, and that, therefore, the state court did not lose jurisdiction.

The sole ground of the decision, both of the state Appellate Court and the Supreme Court, denying the jurisdiction of the Federal court, was that the bond filed with the petition, although signed by two persons, whose sufficiency was not questioned, *was not also signed by the petitioner.* (68 Ill. App., at 669; 173 Ill., at 449; Pr. Rec., 606-607.)

In the briefs filed for defendants in error in support of the motions to dismiss or affirm, which the court reserved to the hearing on the merits, it is contended by counsel that this writ of error is "*frivolous*" and was brought "*for delay.*"

It is also said that the "great mass of bondholders have agreed to the *reorganization*" that "the merits of the controversy are solely and entirely with this defendant in error," and that the record shows "a persistent, constant and malicious effort to destroy and wreck the property of this defendant in error." (Br. for Lake St. Co,. 57-58.)

What is so said is based wholly, as we claim, on erroneous and misleading statements of alleged facts which it is proper that we should correct in this connection.

The evidence in the record shows, and it is stated in the briefs of counsel for defendants in error, that the Lake Street Company was unable to meet the interest on its bonds. It thereupon proposed the scheme of so-called "reorganization," whereby, in effect, the first mortgage debt of the company was to be scaled to sixty per cent. of its face value, an additional fifteen per cent. in unsecured non-cumulative income bonds being also given the bondholders. (Pr. Rec., 66-69, 364-370).

The record also shows that, at the time the holders of the first mortgage bonds were asked to join in this so-called "reorganization," there was a floating indebtedness of nearly $1,000,000. (Pr. Rec., 349, 420). The capital stock of the company actually issued and outstanding amounted to $10,000,000. (Pr. Rec.,202-203). By the proposed plan of so-called "reorganization," the holders of this $10,000,000 of stock were to retain the same control of the company which they had always had. (Pr. Rec.,364-370). They made no offer either to surrender any part of this $10,000,000 of stock for the purpose of issuing preferred stock to the first mortgage bondholders to the amount they were asked to scale their mortgage debt, or to advance any money whatever, either in the payment of the mortgage interest or of any part of the floating debt.

By the proposed so-called "reorganization" the first mortgage indebtedness of this admittedly insolvent debtor was thus in effect to be scaled down forty per cent. for the benefit of the stockholders in the company, without any return or concession from them whatever. In fact, by the device of a non-cumulative income bond given for an additional fifteen per cent. of the indebtedness, the stockholders were let into possible dividends in preference even to accumulations in interest on these bonds.

By various means, by defaulting in the interest due the non-assenting bondholders (while the assenting bondholders were promptly paid theirs in the form of interest on debentures, secured by their bonds), etc., a large majority of the bondholders were induced to accept the terms offered them. (Pr. Rec., 348, 352, 354, 394-398.)

It was required that the bonds consenting to the scaling arrangement should be deposited with the Northern Trust Company as custodian, and a very large majority, covering all but about $1,000,000 of the bonds, were so deposited with that company. There were $7,500,000 of bonds issued, and about $6,500,000 of them passed into the hands of the Northern Trust Company. (Pr. Rec., 371.)

The record also shows that while the mortgagor made default in three successive installments of interest due on the bonds, each installment of interest on the debentures issued to the bondholders assenting to the scaling arrangement was being promptly paid as it became due.

In this situation the non-assenting bondholders, holding about $1,000,000, including the holders of the 610 bonds, mentioned as joining in the demands on the trustees, were demanding the over-due interest, and asked both the trustees to bring a suit to enforce the security. And written demands to take action were served on the trustees. (Pr. Rec., 394–400.)

Following these demands, a bill was filed by the Lake Street Company in the state court in December, 1895, to enjoin the holders of 605 of the bonds, joining in the formal demands, from enforcing the bonds, and an *ex parte* injunction was obtained. This suit was removed by thedefendants to the United States court, and a motion was then made to dissolve the injunction, which was pending at the time the present bill was filed. (Pr. Rec., 301, 465-467..)

The record shows repeated conferences between the two trustees and the Lake Street Company, as a result of which the American Trust and Saving Bank declared that it

would not bring or join in bringing any suit or otherwise take action to enforce the security. (Pr. Rec., 349, 356.) On the other hand, the Farmers' Loan and Trust Company came to the conclusion that such a state of facts was presented as required the submission of the matter to a court of equity, and for that purpose decided to file a bill for foreclosure.

At the time the foreclosure bill was filed, two installments of interest (and part of a third) were in arrears.

The record shows that on January 30, 1896, within an hour after the foreclosure bill was filed in the Federal court, the suit now before the court was begun in the state court, and an *ex parte* injunction obtained against the further prosecution of the foreclosure suit, already begun in the United States Court. (Pr. Rec., 77, 555.)

It is contended by counsel for defendants in error in support of the motion to dismiss or affirm that, even if this court should decide that the case was properly removed, and must therefore proceed in the United States court, that court will have no course open to it but to follow the decision of the state Supreme Court on the question of the removal of the trustee, and that, therefore, plaintiff in error can expect nothing, even from a reversal, except delay, and that it follows that this writ of error is prosecuted only for delay. (Br. for Lake St. Co., 57.)

The contention is, in effect, that the question of the removal of plaintiff in error as trustee depends *solely on the construction to be given to the state statute providing for a deposit by trust companies, doing business in the state*, before accepting any trust, etc., and that the state Supreme Court, having given a construction to this statute in the opinion filed in this case, which requires the

deposit, the United States Court will of necessity follow that decision, and, therefore, remove the plaintiff in error. (Br. for Lake St. Co., 26, 27.)

The following are the facts as to this contention:

1. The precise question of the construction to be given to the statute referred was expressly passed upon by Judge JENKINS of the United States Circuit Court, in a case decided long before the filing of the present bill. (*Farmers' Loan & Trust Co.* v. *C. & N. P. R. R. Co.*, 68 Fed. R., 412.) And in that decision, the precise construction of the statute contended for by plaintiff in error was adopted, Judge JENKINS holding that a mortgage of the character of the one in question was not a trust within the meaning of the statute, and that, therefore, the trustee was not required to make the deposit before accepting and acting under it. The contention of counsel is, in effect, that the state Supreme Court, by assuming a jurisdiction which his contention assumes it did not have, has in effect forestalled the decision of the United States court in a case of which it alone had jurisdiction, and precluded it even from following its own previous decision to the contrary.

2. But in fact, this alleged ground for the removal of the plaintiff in error was taken away by a subsequent express statute, amendatory of the previous law, passed by the legislature of the State of Illinois in 1897, and after the rendition of the decree in the state court, a copy of which amendatory act is appended to our brief on the motion to dismiss or affirm.

By this amendatory act, the section of the original act, which required the deposit to be made, is amended by substituting a new amended section in its place. In other words, the particular section, as it was at the time of the

decision and decree of the trial court, was repealed, and a new amended section is substituted for it.

This new amended section, after making changes as to the amount of the deposit and other requirements, concludes with this language, *not in the original section*, viz: "*This act shall not apply to taking or accepting mortgages or trust deeds to secure bonds or money loaned.*"

There can be no question that a trust deed to secure bonds, like the trust deed of the Lake Street Company to plaintiff in error and its co-trustee, now before this court, is "a mortgage *or trust deed* to secure bonds or money loaned," and is, therefore, excluded from the operation of the act.

The effect, therefore of this amendment was, that irrespective of the question of the proper construction of the original act, the trust estate given by the mortgage to plaintiff in error, became a vested estate which no subsequent act of the legislature could divest.

3. At the next session of the legislature of Illinois after the decision by the Supreme Court in this case, the act in question was further amended so as to expressly require foreign trust companies trustees under mortgages to make the deposit. (Laws of Illinois of 1899, p. 110.) Thereupon the plaintiff in error—acting in obedience to this statute which it claims was the first statute which included it—*made the deposit required by it, and obtained a proper certificate of such deposit, which it now holds.* It has therefore now made the deposit—its failure to make which, after an opportunity given by the court to do so was the sole ground of the decree of the state court removing it as trustee (Pr. Rec., 98) and this proof of fact will be made on the hearing if the case

is remanded for trial in the United States court, as we contend it should be.

4. But the question stated by counsel as the sole question involved in determining the question as to the removal of plaintiff in error as trustee is not the sole question.

Other questions were raised, the decision of any one of which in favor of plaintiff in error would be fatal to the relief asked by the bill.

One of these questions was, whether all the bondholders, or a sufficient number to properly represent all, were not necessary parties to this bill, praying for the removal of the trustee, and this was one of the questions considered at length both by the Illinois Appellate Court (68 Ill. App., at 675) and by the Illinois Supreme Court (173 Ill.. at 457-460). And this question, being one of general law, is one, on which the decision of the state court would have no binding force in the Federal court.

5. If the case proceeds in the United States court, we shall also contend that, under the undisputed facts and the rules of law governing the subject of removal of trustees, no ground was shown for the removal of plaintiff in error as trustee.

6. Still another question was made, viz., whether the plaintiff in error was, in fact, "doing business in Illinois," within the meaning of the statute. It was conceded, and the Supreme Court of Illinois held, that unless it was, it was not within the requirement. That court, however, held that, *upon the evidence adduced in the particular trial*, it was doing business; *non constat*, but that *on another trial* in the Federal court, other evidence may be introduced which will show that plaintiff in error was not doing business.

7. Still another question raised, was whether, under any circumstances, the court should enter the decree it did, enjoining the further prosecution of the foreclosure suit previously brought and pending in the Federal court, and of which plaintiff in error contends the Federal court acquired jurisdiction prior to that of the state court.

ASSIGNMENT OF ERRORS.

I.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to wit: That it appears in and by the record and proceedings aforesaid that said plaintiff in error had and claimed in the Superior Court of Cook County, Illinois, and in the Appellate Court in and for the First District of Illinois, and in said Supreme Court of Illinois, the right and privilege, under the constitution and statutes of the United States, to remove this case to the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division thereof, and that in and by its said judgment the Supreme Court of Illinois erroneously decided against said right and privilege of said plaintiff in error.

II.

That said Supreme Court of Illinois erred in rendering its said judgment in this, to wit: That it appears in and by the record and proceedings aforesaid, that the plaintiff in error claimed in said Superior Court and in said Appellate Court and in said Supreme Court of Illinois, the right and privilege, under the constitution and statutes of the United States, to remove this cause to the Circuit Court of the United States for the Northern District of Illinois, Northern Division thereof, and duly filed its petition and bond for such removal, and that in and by its said judgment said Supreme Court of Illinois erroneously decided against the said right and privilege of the plaintiff in error, and erroneously held that said bond for removal was not in compliance with the statutes of the United States providing for the giving of the same.

III.

That said Supreme Court of Illinois erred in holding that the bond (set out in the transcript of record herein) for removal of this cause to said Circuit Court of the United States, was not made in compliance with the statutes of the United States providing for the giving of same.

IV.

That the Supreme Court of Illinois erred in rendering its said judgment in this, to-wit: That it appears in and by the record and proceeding aforesaid, that the order entered herein by said Superior Court on the third day of February, A. D. 1896, and set out in the transcript of record herein, denied the plaintiff in error the right and privilege, under the constitution and statutes of the United States, to remove this cause to said Circuit Court of the United States, and that said order was erroneous, and that said Supreme Court of Illinois erred in not reversing, because of said erroneous order of said Superior Court, the judgment herein of said Appellate Court of Illinois, in and for the First District of Illinois, which affirmed all the orders and decrees entered herein by said Superior Court, and in deciding against said right and priviledge of said plaintiff in error.

V.

That said Supreme Court of Illinois erred in not holding that said Superior Court erred in ordering in and by its said order, entered on the third day of February, A. D. 1896, that the motion of the plaintiff in error, based on its petition and bond, for removal of this cause to the said Circuit Court of the United States, be denied, and in not reversing the cause on account of said error of said Superior Court

VI.

That said Supreme Court of Illinois erred in not reversing the decree of said Superior Court, because it refused

to accept the petition and bond filed herein by plaintiff in error for removal of this cause to the said Circuit Court of the United States, and to order the removal of the cause to said Circuit Court of the United States, and to proceed no further therein.

VII.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court in retaining jurisdiction of this cause after the plaintiff in error filed in and presented to said Superior Court its said petition and bond for removal of this cause to said Circuit Court of the United States.

VIII.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court of Cook County in taking proceedings in said cause after the plaintiff in error filed in and presented to said Superior Court its said petition and bond for removal of this cause to said Circuit Court of the United States.

IX.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court of Cook County in entering herein on the fourth day of June, A. D. 1896, the decree of that date, set out in the transcript of record herein, after the plaintiff in error had filed in and presented to said Superior Court its said petition and bond for removal to said Circuit Court of the United States.

X.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court in entering its order of the eighteenth day of March, A. D. 1896, set forth in the transcript herein, after the plaintiff in error had filed in and presented to said Superior Court its said petition and bond for removal of the cause to said Circuit Court of the United States.

XI.

That said Supreme Court of Illinois erred in not reversing the action of said Superior Court of Cook County in finding in and by said order entered in said Superior Court on said eighteenth day of March, A. D 1896, that it had jurisdiction of the parties and subject-matter of this cause after plaintiff in error had presented to and filed in said Superior Court its said petition and bond for removal of the cause to said Circuit Court of the United States.

XII.

That said Supreme Court of Illinois erred in not holding that said Superior Court of Cook County erred in finding and adjudicating in and by said decree (set out in the transcript of record herein), entered in said Superior Court on the fourth day of June, A. D. 1896, and after the presentation to and filing in said Superior Court of said petition and bond for removal of the cause to said Circuit Court of the United States by the plaintiff in error, that it, said Superior Court of Cook County, had jurisdiction of the cause and of all the parties hereto, and in not reversing the cause on account of said error of said Superior Court.

XIII.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to wit, that it appears in and by the records and proceedings aforesaid that said plaintiff in error duly filed in said Superior Court in this cause its bond and petition for removal of this cause to the said Circuit Court of the United States and presented the same to said Superior Court; that that court thereupon erroneously denied said petition; that thereupon plaintiff in error obtained an order from said Circuit Court of the United States directing the docketing of this cause in said United States Circuit Court; that there-

upon plaintiff in error filed a transcript of the record of this cause from said Superior Court in the clerk's office of said United States Circuit Court in accordance with said order so obtained; that thereupon and before taking any further steps in said Superior Court all of said defendants in error duly entered their general appearance in this cause in said Circuit Court of the United States and there made their several motions to remand this cause to said Superior Court, and pressed their said motions for hearing, and argued the same fully before said United States Circuit Court; that thereupon said Circuit Court of the United States overruled said motions to remand and held that this cause was properly removed; that said adjudication so obtained upon the motion and insistence of said defendants in error thereupon was conclusive, until duly set aside and reversed, of the said questions of removal and jurisdiction, and that said Supreme Court of Illinois erred in not reversing the action of said Superior Court in thereafter exercising jurisdiction in this cause and proceeding with this cause, and in not holding that the said adjudication of said United States Circuit Court was conclusive, until duly set aside or reversed, of said questions of jurisdiction and remanding.

XIV.

That said Supreme Court of Illinois erred in not holding that said Superior Court erred in proceeding in this cause and in entering in said Superior Court said decree, entered therein on the fourth day of June, A. D. 1896, after this cause was docketed in said Circuit Court of the United States in and for the Northern District of Illinois, Northern Division thereof, and after said the Lake Street Elevated Railroad Company and the American Trust and Savings Bank and the Northern Trust Company, respectively, moved to remand this cause to said Superior Court, and after said Circuit Court of the United States entered the order denying said motions to remand, and the other proceedings in said Circuit Court of the United States shown in evidence on the hearing of this cause in said Superior Court, and in not reversing the cause on account of said error of said Superior Court.

XV.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to-wit, that it appears in and by the record and proceedings aforesaid that said Circuit Court of the United States adjudicated the question of its jurisdiction over this cause by entering the orders (set out in the transcript of record herein) docketing this cause in said Circuit Court of the United States and overruling the motions to remand the cause to said Superior Court, and that such adjudication was conclusive until duly set aside or reversed on the said question of jurisdiction, and that said Supreme Court of Illinois erred in not holding that said Superior Court erred in proceeding with the cause after such adjudication had been made by said Circuit Court of the United States, and in not deciding that said adjudication was conclusive until duly set aside or reversed on said question of jurisdiction, and in not reversing the cause on account of said error of said Superior Court.

XVI.

That said Supreme Court of Illinois erred in rendering the said judgment in this, to-wit, that it appears in and by the record and proceedings aforesaid that the plaintiff in error had filed a bill to foreclose the mortgage trust deed dated April 7th, 1893 (set out in the transcript of record herein), in the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division thereof, and said Circuit Court of the United States had acquired full jurisdiction thereof prior to the commencement of this suit in said Superior Court of Cook County, Illinois, and that therefore said Supreme Court of Illinois erred in not holding that said Superior Court erred in ordering, adjudging and decreeing in and by the said decree entered in said Superior Court on said fourth day of June, A. D. 1896, as follows, to wit:

"And it is further ordered, adjudged and decreed by the court that the said defendant, the Farmers' Loan and Trust Company, and its attorneys, solicitors, officers,

agents and servants, and each and every of them, be, and they are hereby, perpetually enjoined and restrained from taking any proceedings or bringing or prosecuting any suit or suits to foreclose said mortgage or trust deed from said complainant to said American Trust and Savings Bank and said Farmers' Loan and Trust Company," and in not reversing the cause on account of said error of said Superior Court.

XVII.

That said Supreme Court of Illinois erred in rendering the said judgment in this, to wit, that it appears in and by the record and proceedings aforesaid that prior to the commencement of this suit in said Superior Court the plaintiff in error had filed a bill of foreclosure of the mortgage trust deed dated April 7th, 1893 (set out in the transcript of record herein), in the said Circuit Court of the United States, and said Circuit Court of the United States had acquired full jurisdiction thereof, and that therefore said Supreme Court of Illinois erred in not holding that said Superior Court erred in ordering, adjudging and decreeing in and by said decree entered in said Superior Court on said fourth day of June, A. D. 1896, that the plaintiff in error be perpetually enjoined and restrained from "acting in any manner whatsoever under and by virtue of the terms, provisions and conditions of said mortgage or deed of trust so made, executed and delivered by the said complainant, the Lake Street Elevated Company, to the said defendant, the American Trust and Savings Bank, as trustee, and the said defendant, the Farmers' Loan and Trust Company, as co-trustee," and in not reversing the cause on account of said error of said Superior Court.

XVIII.

That said Supreme Court of Illinois erred in rendering the said judgment, in this, to-wit, that from the record in this cause it appears that the plaintiff in error filed a bill to foreclose the mortgage trust deed dated April 7th, 1893 (set out in the transcript of record herein), and that

said Circuit Court of the United States acquired full jurisdiction of said foreclosure suit and of said mortgaged property and of the enforcement of said mortgage trust deed prior to the commencement of this cause; that all said defendants in error were made parties to said foreclosure suit and voluntarily appeared therein and answered said foreclosure bill; that in this cause said Superior Court entered a decree, in and by which, among other things, it perpetually enjoined and restrained plaintiff in error from proceeding with or prosecuting said foreclosure suit, and that thereby the said Superior Court enjoined or attempted to enjoin a proceeding theretofore pending in said United States Circuit Court, contrary to the laws and statutes of the United States of America, and therefore the said Supreme Court of Illinois erred in not reversing said decree of said Superior Court, so enjoining further prosecution to said foreclosure cause.

XIX.

That said Supreme Court of Illinois erred in rendering its said judgment herein in this, to-wit, that it appears in and by the record and proceedings aforesaid that said plaintiff in error had and claimed in said Superior Court of Cook County, Illinois, and in said Appellate Court in and for the First District of Illinois and in said Supreme Court of Illinois, rights and privileges under the constitution and statutes of the United States, and that in and by its said judgment the Supreme Court of Illinois erroneously decided against said rights and privileges of said plaintiff in error.

POINTS AND AUTHORITIES.

I.

THE RULING OF THE STATE SUPREME COURT (THE SOLE GROUND OF ITS DECISION) THAT BY REASON OF THE FACT THAT THE PETITIONER, THE FARMERS' LOAN AND TRUST COMPANY, WAS NOT NAMED AS ONE OF THE OBLIGORS IN AND DID NOT SIGN THE BOND PRESENTED AND FILED WITH THE PETITION FOR REMOVAL, THE PETITION AND BOND WERE INSUFFICIENT AND THE FEDERAL COURT DID NOT ACQUIRE JURISDICTION, WAS BASED ON A MISTAKEN CONSTRUCTION OF THE REMOVAL ACT AND WAS THEREFORE ERRONEOUS.

For the removal bond, see Pr. Rec., 34-34.

As directly in point, to show that the bond was in compliance with the Removal Act, see:

Stevens v. *Richardson*, 20 Blatchf., 53; s. c., 9 Fed. R., 191 (decided by Judge BLATCHFORD in 1881).

People's Grain & Stock Ex. v. *Tel. Co.*, 11 Biss., 568; s. c., 16 Fed. R., 289 (decided by Judge DRUMMOND in 1883).

Bank v. *Insurance Co.*, 53 Fed. R., 161.

2 Foster Fed. Pr., 2nd Ed., sec. 385 *b*.

Desty on Removal, sec. 106*a*.

2 Desty's Fed. Proc. (8th Ed.), p. 386.

20 Am. & Eng. Ency. of Law, p. 1022.

Dillon on Removal of Causes (4th Ed.), sec. 74*a*, note four.

As to certain rules of construction, applicable to the provision for the bond, contained in Sec. 3 of the Act of 1888, see

Bernier v. *Bernier*, 147 U. S., 242, at p. 246.
Oakes v. *Bank*, 100 U. S., 239, at p. 244.
Lau Ow Bew v. *U. S.*, 144 U. S., 47.
Powers v. *R. R. Co.*, 169 U. S., 92.

The provisions of Section 3 of the Act of 1888, requiring a bond, are merely "modal and formal," and not jurisdictional.

Ayers v. *Watson*, 113 U. S., 598.
Removal cases, 100, U. S. 457.
Powers v. *R. R. Co.*, 169 U. S., 92, at p. 101.

See, also,

People's Bank v. *Ins. Co.*, 53 Fed. Rep., 161.

On appeal or writ of error to this court, the appellant or plaintiff in error need not sign or be an obligor in the appeal bond, and there is no reason for a different holding as to the bond required on a removal.

Brochett v. *Brochett*, 2 How., 238.
Scruggs v. *R. R. Co.*, 131 U. S., Appendix cciv.

II.

IN THE VIEW THAT THE CASE ONLY INVOLVED A SINGLE CONTROVERSY, NEITHER THE NORTHERN TRUST COMPANY NOR THE AMERICAN TRUST AND SAVINGS BANK WAS AN INDISPENSABLE OR EVEN NECESSARY PARTY TO THE CONTROVERSY, AND, IF EITHER OF THEM WAS, IT SHOULD NOT BE RANGED ON THE SAME SIDE OF THE CONTROVERSY AS THE PLAINTIFF IN ERROR, AND THE CASE WAS, THEREFORE, PROPERLY REMOVED TO THE UNITED STATES COURT.

1. *The rules as to the question of jurisdiction on removal applicable to this case, as settled by the decisions of this court.*

The fact that particular defendants may be *proper parties* to the suit does not make their presence as parties material to the question of removal.

Proper parties are divided for the purpose of jurisdiction into three classes: (1) *formal*, (2) *necessary* and (3) *indispensable* parties.

Williams v. *Bankhead*, 19 Wall., 563, at p. 571.

The following cases, in which the jurisdiction was sustained, further illustrate the rules as to the different classes of parties, applicable to the case before the court:

Wormley v. *Wormley*, 8 Wheaton, 421.
Carneal v. *Banks*, 10 Wheaton, 181.
Mechanics Bank v. *Seton*, 1 Peters, 299.
Vattier v. *Hinde*, 7 Peters, 252.
Boone v. *Chiles*, 8 Peters, 532.
Union Bank of Louisiana v. *Stafford*, 12 How., 327.
Walden v. *Skinner*, 101 U. S., 577.

As to the class of *proper parties* known as *formal parties*, their presence as parties is immaterial on the question of jurisdiction.

Walden v. *Skinner*, 101 U. S., 577.
Bacon v. *Rives*, 106 U. S., 99.

Thus, a party, made a defendant *in order that further relief may be obtained against him, consequential upon or in aid of the main relief*, although a *proper*, is only a *formal* party within the rule, and his citizenship will not defeat the jurisdiction.

Walden v. *Skinner*, 101 U. S., 577.
Bacon v. *Rives*, 106 U. S., 99.

Where *necessary* parties are made parties to a suit, originally brought in the United States Court, their presence will not prevent the court *acquiring jurisdiction*, and if objection is made to a decree against them on the ground of their citizenship, the court will allow a dismissal as to them, and proceed to a decree as to the *indispensable* parties.

Horn v. *Lockhart*, 17 Wall., 570.

This court has held that the language of the Removal Act, "*a* controversy between citizens of different states," must be given the same construction which this court has given to the language in the statute defining the *original* jurisdiction of the Federal court—*a controversy to which the persons who are* INDISPENSABLE *parties to the suit on opposite sides are citizens of different states.*

Barney v. *Latham*, 101 U. S., 205.
Blake v. *McKim*, 103 U. S., 336.

The construction thus given to the language of the removal act, "a controversy between citizens of different

states," which makes the citizenship of the *indispensable* parties the test, has been uniformly recognized both by this court and different Circuit courts.

Barney v. *Latham*, 103 U. S., 205, at 214, 215, 216.

Blake v. *McKim*, 103 U. S., 336.

Mitchell v. *Smale*, 140 U. S., 406.

McHenry v. *R. R. Co.*, 25 Fed. R., 67, 68.

N. Y. Const. Co. v. *Simons*, 53 Fed. R., 1, at 4, 5.

And the very cases cited in the briefs for defendants in error, on the motion to dismiss, expressly recognize the rule.

2. *The contention of defendants in error that the rule as to parties has been changed by the Act of 1888, and that under that Act the citizenship of merely proper parties is material.*

This contention is directly contrary to the decisions in the following cases, in which it was expressly held, under the Act of 1888, that, in determining whether there is a right of removal, the citizenship of merely *proper* parties is not material, but that the citizenship of *indispensable* parties only should be considered.

N. Y. Construction Co. v. *Simons*, 53 Fed R., 1, pp. 3, 4 and 5 (JACKSON J.).

State of Missouri v. *Alt*, 73 Fed. R., 202, at p. 304.

Carver v. *Trust Co.*, 73 Fed. R., 9, at p. 12.

And in the following cases, which arose under the Act of 1888, the rule was recognized:

Merchants C. P. Co. v. *Ins. Co.*, 151 U. S., 368.

Hanrick v. *Hanrick*, 153 U. S., 102.

Consti. Co. v. *Cane Creek*, 155 U. S., 283.

The only difference between the Act of 1888 and the Act of 1875, which is relied on as showing that the Act of 1888 changes the rule theretofore prevailing, is the insertion in Section 2 of the latter Act of the following phrase, in defining what suits are removable, viz., any suit "*of which the Circuit Courts of the United States are given jurisdiction by the preceding sections.*"

The reasoning of counsel in support of this contention ignores the fact that the rule that the citizenship of merely *proper* parties, who are not either *necessary* or *indispensable* parties, and are, therefore, regarded as *formal*, although *proper* parties, is wholly immaterial to the question of Federal jurisdiction, originated in and has been repeatedly affirmed by this court in cases of *original* jurisdiction.

Walden v. *Skinner*, 101 U. S., 577, and cases cited.

Bacon v. *Rives*, 106 U. S., 99.

3. *The Rule as to Ranging Parties.*

Removal Cases, 100 U. S., at p. 469.

Pac. R. R. Co. v. *Ketchum*, 101 U. S., at p. 297–298.

Barney v. *Latham*, 103 U. S., 205.

Harter v. *Kernochan*, 103 U. S., 562.

Carson v. *Hyatt*, 118 U. S., 279.

Evans v. *Watson*, 156 U. S., 527.

4. *The Northern Trust Company Was Not an Indispensable or Even a Necessary Party to the Suit.*

The bill contains no allegations, and prays no relief, against the Northern Trust Company, and does not show by its averments that that company has such an interest as makes it an indispensable, or even a necessary, party.

Pr. Rec., 9, 32.

If it, however, is assumed that the Northern Trust Company had such a relation to the controversy as made its citizenship material, it should not be ranged on the same side of the controversy with the plaintiff in error.

Pr. Rec,, 7-8; 8-9; 94-99; 37; 362-412.

5. *The American Trust and Savings Bank Was Not an Indispensable, or Even Necessary Party, but at Most a Proper Party.*

The American Trust and Savings Bank had *no beneficial* interest in the property, and the bill did not seek to affect any title or powers vested in it.

(1) The fact that plaintiff in error and the American Trust and Savings Bank were *joint tenants* and not *tenants in common*, does not make the latter an indispensable, or even a necessary party.

Stephen v. *Beall*, 22 Wall., 329.

(2) The American Trust and Savings Bank was not an indispensable or even a necessary party *as the representative of the bondholders.*

(3) The trustee does not represent the *cestuis que trustent* in every controversy which may affect their interest under the trust deed.

Thus, *on a bill to have the bonds surrendered*, the trustees do not represent the bondholders.

Appeal of Harrisburg & Eastern R. Co.,
36 Am. & Eng. R. R. Cas., 249.

So it is a well-settled rule that the *cestuis que trustent* themselves are *necessary* parties *to a bill to remove a trustee*, and are not, therefore, represented by the trustee.

1 Perry on Trusts (4th Ed.), Sec. 282.
Hill on Trustees (4th Am. Ed.), star p. 195.
Bear v. *Am. R. Tel. Co.*, 36 Hun, 400.

And this was expressly held by the state Appellate Court in considering another branch of the case (68 Ill. App., 675).

Whether, in a particular suit, the trustee can sue and defend *as the representative* of the *cestuis que trustent*, or the beneficiaries themselves, must be made parties, necessarily depends on the nature of the controversy and the terms and provisions of the trust deed, defining the duties and powers of the trustee.

Kerrison, Assignee, v. *Stewart et al.*, 93 U. S., 160.

The terms of the trust deed show that the American Trust and Savings Bank cannot be held a representative of the bondholders in this suit to remove its co-trustee. (Pr. Rec., 11–27.)

The fact that the bill also seeks the appointment by the court of a new trustee, *after* the removal of plaintiff in error has been decreed, does not make the American Trust and Savings Bank an indispensable or even a necessary party.

First. The court would have no power to appoint a new trustee, unless and until the American Trust and Savings Bank refused to appoint, and it must be presumed that it would perform its duty by making the appointment.

Gibson v. *Trust Co.*, 58 Hun, 443.

The fact that a party is made a defendant in order that further relief may be obtained against him, *consequential upon a decree granting the main relief*, does not make him a necessary party, so that his presence will defeat the jurisdiction.

Walden v. *Skinner*, 101 U. S., 577.
Bacon v. *Rives*, 106 U. S., 98.

Second. The mere fact that particular relief is prayed against a defendant does not make him an indispensable or even necessary party, *unless the allegations of fact* in the bill show him to be so.

McHenry v. *R. R. Co.*, 25 Fed. R., 65.
Dow v. *Bradstreet*, 46 Fed. R., 577.
Shepard v. *Bradstreet*, 65 Fed. R., 142.
Landis v. *Felton*, 73 Fed. R., 311, 313.
Warak v. *Ry. Co.*, 72 Fed. R., 637.
Rivers v. *Bradley*, 53 Fed. R., 305.
Ferguson v. *R. R. Co.*, 63 Fed. R.,177.
Brown v. *Murry Nelson & Co.*, 43 Fed. R., 614.
Overman Wheel Co. v. *Pope Mfg. Co.*, 46 Fed. R., 577.

And the bill did not contain any *allegations of fact* on which the court could deprive the American Trust and Savings Bank of its right to appoint a successor to plaintiff in error. (See the provision of the trust deed as to appointing a successor in trust; Pr. Rec., 26.)

It is perfectly clear that this power is a power the exercise of which a court of equity cannot deprive the bank of, or interfere with, limit or control, unless on a bill

setting up the existence of such a state of facts as would justify such action on the part of the court.

1 Perry on Trusts, sec. 487.

Golden v. *Bressler*, 105 Ill., 410, at 431.

Moreover, the court below did not appoint a trustee, but, *under the prayer for general relief*, only directed the American Trust and Savings Bank to do what it was made its duty to do by the provisions of the trust deed, and what it is to be presumed it would have done without any decree—appoint the new trustee in place of the Farmers' Loan and Trust Company which the decree removed.

6. *The American Trust and Savings Bank should not be ranged on the same side of the controversy with the Farmers' Loan and Trust Company, and for that reason its presence as a defendant should not defeat the removal.*

(1) Under the allegations of the bill, the American Trust and Savings Bank cannot be ranged on the same side as plaintiff in error. (Pr. Rec., 11–27.)

(2) And the correctness of our construction of the allegations of the bill, material to be considered in this connection, is conclusively confirmed by the action of the American Trust and Savings Bank in the suit, in continuously and from the first ranging itself on the side of the complainant. (Pr. Rec., 39–40; 101–102; 102–429; 411; 412; 421–429; 39; 429; 574; 575; 549; 300; 558–574; 362; 576.)

That such subsequent action can be properly considered in determining on which side the American Trust and Savings Bank should be ranged, see

Pac. R. R. Co. v. *Ketchum*, 101 U. S., 289.

Illinois v. *Ill. Cent. R. R. Co.*, 16 Fed. R., 881.

Hutton v. *Bancroft & Sons Co.*, 77 Fed. R., 481.

III.

THERE WAS IN FACT A SEPARABLE CONTROVERSY IN THE CASE, WHICH COULD BE FULLY DETERMINED AS BETWEEN THE COMPLAINANT AND THE PLAINTIFF IN ERROR, WITHOUT THE PRESENCE OF THE OTHER DEFENDANTS, THE AMERICAN TRUST AND SAVINGS BANK AND THE NORTHEHN TRUST COMPANY, AND THE CASE WAS THEREFORE REMOVABNE.

We contend, and Judge GROSSCUP held, that there were in the case in fact two separable controversies:

1. The controversy as to an injunction to enjoin plaintiff in error from bringing a suit to foreclose or prosecuting the suit it had already brought.

2. The controversy as to the removal of plaintiff in error as trustee.

(See the allegations of the bill—Pr. Rec., 5-8.)

For Judge GROSSCUP'S opinion, see *Lake Street Company* v. *Farmers' Loan and Trust Co.*, 72 Fed. Rep., 804.

IV.

THE BILL WAS BROUGHT FOR THE PURPOSE OF ENJOINING, BY AN INJUNCTION ISSUED OUT OF THE STATE COURT, THE FURTHER PROSECUTION IN A COURT OF THE UNITED STATES OF A SUIT PREVIOUSLY BROUGHT IN THAT COURT BY THE PLAINTIFF IN ERROR, UNDER THE AUTHORITY OF THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND THEREFORE INVOLVED A FEDERAL QUESTION, ENTITLING THE PLAINTIFF IN ERROR TO REMOVE THE CASE TO THE UNITED STATES CIRCUIT COURT.

The bill was brought to enjoin the prosecution of a suit previously begun in the United States Court. (Pr. Rec., 8, 9; 254-260; 261-291; 299; 300; 574; 576-577; 95-97; 98-99; 32.)

The right to prosecute suits, already commenced in the Federal courts, is a right conferred by the Constitution and laws of the United States, and a suit, which seeks an injunction against the exercise of that right, is a suit "arising under the Constitution and laws of the United States."

This suit could have been originally commenced in the United States Court by the complainant, without regard to the citizenship of the parties.

Clarke v. *Matthewson*, 12 Peters, 164.
Bock v. *Perkins*, 139 U. S., 628.
Sims v. *Guthrie*, 9 Cranch, 25.
Krippendorf v. *Hyde*, 110 U. S., 276.
Jones v, *Andrews*, 10 Wall., 327.
Freeman v. *Howe*, 24 How., 450.

S. L. K. of P. v. *Wilson*, 66 Fed. R., 785.
Dunlop v. *Stetson*, 4 Mason, 349.
Logan v. *Patrick*, 5 Cranch, 288.

And if so, the suit was removable by the express terms of the Act of 1888, viz: that any suit "of which the Circuit Courts are given original jurisdiction" under the Act, may be removed.

Tennessee v. *Bank*, 152 U. S., 454.

In passing on the right to remove, on the ground of a Federal question, the courts will not examine into the merits of that question, *further than to see that such question exists.*

The *merits* of the Federal question will afterwards be examined into by the Federal court in the exercise of the jurisdiction it has acquired by reason of the Federal question.

Furman v. *Nichol*, 8 Wall., 44.
Green v. *Van Buskirk*, 5 Wall., 307.
Kessinger v. *Hinkhouse*, 27 Fed. R., 883.
Mahin v. *Pfeiffer*, 27 Fed. R., 892.
Hatch v. *Bridge Co.*, 7 Sawyer, 127.

In many cases the Federal courts have sustained their jurisdiction on the ground that there was a Federal question, although they have finally decided that question against the Federal right.

Buck v. *Colbath*, 3 Wall., 320.
McGuire v. *Commonwealth*, 3 Wall., 395.
Walte v. *Dowley*, 94 U. S., 527.
Cohen v. *Virginia*, 6 Wheat., 264.
Weil v. *Calhoun*, 25 Fed. R., 865.
S. G. L. Co. v. *Saginaw*, 28 Fed. R., 529.

1. The fact that the bill did not state specifically that complainant was seeking an injunction against the prosecution of the foreclosure suit in the United States Court, does not show that the case was not removable, under the doctrine of *Tennessee* v. *Bank*, 152 U. S., 454;

(1) Because the plain and sweeping language of the prayer of the bill for an injunction against "prosecuting *any* suit" clearly included the pending foreclosure suit in the United States Court.

(2) Because the United States Court takes judicial notice of the suits pending before it, and it, therefore, follows that it appeared from the bill, in connection with matters of which that court takes judicial notice, that the case involved a Federal question.

Pitkin v. *Cowen*, 91 Fed. R., 599.

(3) Because the complainant's case, as set out in its bill, necessarily involved proof of the facts which raised the Federal question.

Texas and Pac. Ry. Co. v. *Cody*, 166 U. S., 606.

Supreme Lodge v. *Wilson*, 66 Fed. R., 785.

This being so, complainant could not deprive plaintiff in error of its constitutional and statutory right to remove the case, on the ground of that Federal question, by the mere device of omitting to state his case definitely and specifically in its bill.

Cases last cited, *supra*.

2. The suit involved a Federal question, notwithstanding the fact that the injunction sought by the bill against prosecuting the foreclosure suit in the United States

Court, was against *the parties*, and not against *the United States Court itself*.

See

Bank v. *Stevens*, 169 U. S., 459-463.

3. The question as to whether the summons in the state court case was served before service of the summons, issued on the foreclosure bill in the United States Court, is not material in determining the question of the removability of the case on the ground that it involved a Federal question.

See, also, in this connection, Point VI, *infra*.

4. The petition for removal on the ground of Federal question was not insufficient because not made by all the defendants in the case.

Section 2 of the Act of 1888.

Mitchell v. *Smale*, 140 U. S., 406.

R. R. Co. v. *Townsend*, 62 Fed. Rep., 161.

Landers v. *Felton*, 73 Fed. Rep., 311.

Black's Dillon on Removal, sec. 77, note (98), p. 114.

Moreover, as we have shown (Point III, *supra*), neither the American Trust and Savings Bank nor the Northern Trust Company is an indispensable or even a necessary party to the suit, and, if either of them was such a party, it must be ranged on the side of complainant.

V.

THE DECISION OF THE UNITED STATES CIRCUIT COURT ON THE MOTIONS TO REMAND WAS AN ADJUDICATION OF THE FEDERAL QUESTION AS TO WHETHER THE CAUSE WAS REMOVED TO THE UNITED STATES COURT, MADE ON THE MOTIONS OF DEFENDANTS IN ERROR SUBMITTING THE QUESTION TO THAT COURT FOR ITS DECISION, AND THE STATE COURT ERRED IN PROCEEDING FURTHER IN THE CASE AFTER THAT ADJUDICATION HAD BEEN BROUGHT TO ITS NOTICE BY PROPER PLEADINGS AND PROOFS.

For the order to remand, the motions, and the order denying the motions, see Pr. Rec., 533-4, 538, 545; for Judge GROSSCUP'S opinion on entering the order, see *Lake Street Co.* v. *Farmers' L. & T. Co.*, 72 Fed. Rep., 804.

(See, also, for the steps taken by the defendants in error in the United States court, Pr. Rec., 538, 533-535, 548; 77 Fed. Rep., 769.)

There is a clear distinction between the legal effect of the action *of the state court in refusing an order for removal*, and that of the order *of the Federal court, made on a motion to remand, entered in that court, after the cause has been docketed there, overruling the motion and refusing to remand.*

It is settled by repeated decisions of this court that the action of the state court, refusing an order of removal, is not an *adjudication* of the question of *jurisdiction* between the parties, and that, therefore, notwithstanding such order, the case may be docketed and the record filed in the Federal court, and that court may proceed and take jurisdiction in the case.

Kern v. *Huidekoper*, 103 U. S., 485, 489.
Dietzsch v. *Huidekoper*, 103 U. S., 493.
Marshall v. *Holmes*, 140 U. S., 589–595.

The following cases, decided by this court, establish that where, after the transcript has been filed in the Circuit Court of the United States, the adverse party there appears and makes a motion to remand, and an order is made on that motion, either remanding or refusing to remand, the order is *a direct adjudication of the question of jurisdiction between the parties by the Federal court, in the exercise of a jurisdiction which the law recognizes as exclusive in the Federal courts.*

Railroad Co. v. *Koontz*, 104 U. S., 5, at 15.
Ex parte Ford, 105 U. S., 578.
Turner v. *Farmers' Loan and Trust Co.*, 106 U. S., 552.
Edgerton v. *Jefferson*, 111 U: S., 770, at 773.
Des Moines Navigation Co. v. *Iowa Homestead Co.*, 123 U. S., 552, at 559.
Dowling v, *Applegate*, 152 U. S., 327, at 340.

If, on the motion to remand, the decision of the Federal court is that it has no jurisdiction, and an order is accordingly entered remanding the case to the state court, this order of remand, which was formerly appealable directly to this court, is, under the Act of 1888, a final adjudication of the question in both the state and Federal courts, for the reason that the right of appeal from the order to this court has been taken away.

Missouri Pacific Ry. Co. v. *Fitzgerald*, 160 U. S., 556.

On the other hand, if the decision on the motion is that the Federal court has jurisdiction, and an order is accordingly entered overruling the motion to remand, the remedy of the party making the motion is to preserve the point on the record, and assign the ruling for error in this court on appeal from the final decree.

Edgerton v. *Jefferson*, 111 U. S., 770.
Ex parte Ford, 105 U. S., 578.
R. R. Co. v. *Koontz*, 104 U. S., at 15.

Our position on this point is directly supported by the decision of this court in

Turner v. *Farmers' Loan and Trust Company*, 106 U. S., 552, affirming *Turner* v: *I. B. & W. Ry. Co.*, 8 Biss., 380,

and by the decisions in the following cases:

Northern Pac. R. R. Co. v. *McMullen*, 86 Wis., 501.
Ryan v. *Matthews*, 64 Iowa, 250.
Le Roux v. *Bay, Circuit Judge*, 64 Mich., 189.
Bodley v. *Bank*, 38 Kan., 59.
Gerner v. *Mosher*, 78 N. W. Rep., 384.

The only legal effect of the fact that the order overruling the motion to remand was interlocutory was, that the order, which, until set aside, would stand as an adjudication of the Federal question, could be set aside by the court that made it at any subsequent term, as well as at the term at which it was entered, while a final decree could only be set aside at the term.

It is contended in the brief (p. 47) for the American Bank, that "the order of the Circuit Court was purely interlocutory. *Non constat* but that it has been re-considered and set aside or vacated."

There is no pretense in the record that this order has been set aside, and the presumption, in the absence of evidence to the contrary, is that it has not been.

It might as well be argued that, if a final decree had been set up and proved in the case, this decree should not be considered by the court, for the reason that it does not appear but that the decree has been subsequently set aside by the same court that entered it, or reversed on appeal by a higher court.

VI.

THE DECREE OF THE STATE TRIAL COURT PERPETUALLY ENJOINING THE FURTHER PROSECUTION OF THE FORECLOSURE SUIT, PENDING IN THE UNITED STATES COURT AND OF WHICH THAT COURT HAD ACQUIRED JURISDICTION BEFORE THE FILING OF THE BILL IN THIS CASE, WAS WITHOUT JURISDICTION, AND IN VIOLATION OF THE RIGHT OF THE PLAINTIFF IN ERROR UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES TO BRING AND PROSECUTE THE SUIT IN THE COURTS OF THE UNITED STATES.

(See Pr. Rec., 72; 95–97; 98, 99; 559–560; 36; 30, 31; 38; 39.)

ARGUMENT.

I.

THE RULING OF THE STATE SUPREME COURT (THE SOLE GROUND OF ITS DECISION) THAT BY REASON OF THE FACT THAT THE PETITIONER, THE FARMERS' LOAN AND TRUST COMPANY, WAS NOT NAMED AS ONE OF THE OBLIGORS IN AND DID NOT SIGN THE BOND PRESENTED AND FILED WITH THE PETITION FOR REMOVAL, THE PETITION AND BOND WERE INSUFFICIENT AND THE FEDERAL COURT DID NOT ACQUIRE JURISDICTION, WAS BASED ON A MISTAKEN CONSTRUCTION OF THE REMOVAL ACT AND WAS THEREFORE ERRONEOUS.

The sole ground on which the state Supreme Court (and also the state Appellate Court) held that the case was not removed by the presentation and filing of the petition and bond, and that therefore the state court properly retained jurisdiction of the case, was that the petitioner was not named as an obligor in and did not sign the bond. (173 Ill., 439; 68 Ill. App., 666.)

Two obligors were named in the bond; it was in the penal sum of $500, and was conditioned as required by the Removal Act. Attached to and filed with it, was the affidavit of Rockwell King, one of the obligors, that he was worth more than the sum of $10,000 in unincumbered real estate in the City of Chicago, over and above all his debts and liabilities. (Pr. Rec., 33,–34.)

And no objection was at any time made to its sufficiency, either as to its condition or as to the pecuniary responsibility of the obligors.

The record of the state court shows that the bond was

filed in the state court at the same time with the petition, and the petition, after setting out the different grounds of removal, makes this express reference to it:

"Your petitioner *offers herewith* a good and sufficient bond in the penal sum of five hundred dollars ($500) conditioned for its entering in said Circuit Court of the United States for the Northern District of Illinois," etc. (Pr. Rec., 32.)

There was no rule by the state court requiring the petitioner to file a further bond, and the only action of the state court in the matter was the order reciting that the motion and petition for removal came on for hearing, and after consideration, it was ordered that it be denied. (Pr. Rec., 36.)

The removal act provides (Section 3) that the party petitioning for removal "shall make and file" "*a bond with good and sufficient surety*" "for his or their entering in such Circuit Court on the first day of its then next session *a copy of the record*," etc., and "for paying all costs," etc.

It will be observed that there is no requirement here that the bond shall be a bond *signed by the petitioner*. The only bond required is "*a* bond with good and sufficient surety." And as the only object of requiring the bond is to furnish indemnity to the party against whom a removal is sought, that object is as fully accomplished by the presentation and filing with the petition, of a bond conditioned as required by law and with "good and sufficient surety," signed by others as obligors, as if a like bond in which the petitioner was one of the obligors was filed.

The Supreme Court of Illinois held that the words "shall make and file," made it an absolute condi-

tion of the removal of the case, that the petitioner should be named as one of the obligors in the bond presented, and should sign it as such, and that for that reason the petition and bond were insufficient, and did not give the Federal court jurisdiction.

The narrow and technical ground of this decision is forcibly illustrated by the fact, that after the presentation and filing of the petition and bond, the petitioner in fact filed in the United States court the transcript of the record required, and also filed with its appearance, security for costs in addition to the bond already given. (Pr. Rec., 532-533). And in addition to this, the United States Circuit Court, on motion to remand, held the bond sufficient by overruling the motion. (Pr. Rec., 545). And these facts were set up (Pr. Rec., 53) and in evidence (Pr. Rec., 532, 545) at the time the state court decided to proceed and retain jurisdiction of the case, and enter the decree it did.

This decision, which, as we shall show hereafter, was based wholly on the *dicta* of two previous cases decided by the same court, is contrary to the uniform construction given to this provision by a series of Federal decisions beginning with a decision by Mr. Justice BLATCHFORD in 1881, and a like decision in 1883 by Judge DRUMMOND, *in the very circuit in which this case arose, and followed by all the text-writers.*

See the following authorities cited and quoted *infra:*

Stevens v. *Richardson*, 20 Blatchf., 53 s. c., 9 Fed. R., 191 (decided by Judge BLATCHFORD in 1881).

People's Grain & Stock Ex. v. *Tel. Co.*, 11 Biss., 568, s. c.; 16 Fed. R., 289 (decided by Judge DRUMMOND in 1883).

Bank v. *Insurance Co.*, 53 Fed. R., 161.
2 Foster Fed. Pr., 2nd Ed., Sec. 385*b*.
Desty on Removal, Sec 106*a*.
2 Desty's Fed. Proc. (8th Ed.), p. 386.
20 Am. & Eng. Ency. of Law, p. 1022.
Dillon on Removal of Causes (4th Ed.), Sec. 74*a*, note four.

The construction given by these authorities to the provision in question, is that, as the only object of requiring the bond is to furnish indemnity to the party against whom a removal is sought, if the petitioner *presents and files with his petition* a bond conditioned as required by law, and "with a good and sufficient surety", for the purpose of indemnifying the opposite party, he "makes and files" the bond in law, although he is not named as one of the obligors and has not signed it as such.

The reasons on which Judges BLATCHFORD and DRUMMOND based their construction, are so clearly and forcibly stated in their opinions, that we quote from them in this connection.

In *Stevens* v. *Richardson*, 20 Blatchf., 53, *supra* (1881), on a motion to remand where a case had been removed to the United States court under the act of 1875, Mr. Justice BLATCHFORD, in denying the motion, said:

"The plaintiff contends that, as section 3 of the Act of 1875 says that the petitioner for removal is to 'make and file' the bond, the bond is void and the removal invalid. This objection is not tenable. The statute is satisfied, as to the bond, if a bond with sufficient surety is filed. The petitioner for removal *makes the bond, in the sense of the statute, if he offers it to the court as the bond required.* By section 639 of the Revised Statutes he was required to offer good and sufficient security. The Act of 1875 means no more."

In *Public Grain & Stock Exchange* v. *W. U. Tel. Co.*, 11 Biss., 568, *supra* (1883), on a motion to remand, it was contended that the case must be remanded, because the bond was not executed by the party seeking the removal.

In overruling this contention Judge DRUMMOND said:

"Another reason urged by the counsel of the complainant, in favor of the motion to remand, is that the bond executed was not in compliance with the statute. * * * *The objection taken to the bond is that it was not signed by the party.* The language of the statute is that the party seeking to remove shall '*make and file*' a bond. *It is simply for indemnity to the party as security* that there shall be entered in the Circuit Court of the United States, on the first day of its then next session, a copy of the record, and to pay all costs that may be awarded by the Circuit Court, if that court shall hold that the suit was wrongfully or improperly removed. No objection is taken to the sufficiency of the bond or to the responsibility of the principal or the surety. *It will be observed that the statute does not declare that the party shall sign the bond, but only shall make the bond.* If the suit were brought by or against an infant, and he desired to remove the cause, he would not sign the bond, but his next friend or guardian named in the suit. It is admitted that in such a case as that the infant would not make and file the bond, but that the next friend or guardian would be the party who would make and file the bond. It seems to me that *where the bond is presented by the party who seeks the removal, although he may not have signed it, but it is signed by others, that it may be said he makes and files it, because he presents it for the purpose of indemnifying the opposite party, and, if it constitutes ample indemnity for that purpose, then he makes and files the bond in law, although he has not signed it.*

It will be seen that by this express and well considered decision by Judge DRUMMOND, then United States Circuit Judge, rendered in 1883, the con-

struction of the statute, which was followed and acted upon in drawing the bond in this case, was established as the proper construction, *in the very circuit in which this petition and bond were presented.*

And, as we have already said, *supra*, the decisions to which we have referred have been considered by all the text writers as settling the law on this subject, and the construction thus given has been uniformly followed by them as the correct and settled construction.

In Desty on Removal (4th Ed.), Sec. 106*a*, it is said:

"The bond required for the removal of a suit from a state to a Federal court *need not be signed by the applicant for removal* if signed by others named therein as principal and surety, or by sufficient sureties," citing *Public Grain & Stock Exchange* v. *W. U. Tel. Co.*, 16 Fed. Rep., 289, *supra*, and *Stevens* v. *Richardson*, 20 Blatchf., 53, *supra*.

In Dillon on Removal of Causes (4th Ed.), Sec. 74*a*, note (4), *supra*, Judge DILLON says:

"*The bond is not required to be executed by the petitioner himself*, if it be executed by sufficient sureties." citing *Stevens* v. *Richardson*, 20 Blatch., 53, *supra*.

See also to the same effect:

2 Foster's Federal Practice, Sec. 385*b*.

2 Desty's Federal Procedure (8th Ed.) p. 386.

20 Am. & Eng. Ency. of Law, p. 1022.

This construction given thus early to the act by these two eminent Federal judges, gives full effect to the requirement of the act for the purpose intended, and is in accordance with familiar principles of construction.

As we have seen, the manifest sole object of the act was to give indemnity to the opposite party in case of re-

moval, and if the bond presented by the petitioner was conditioned as required by law, and had sufficient surety, it was clearly of no consequence whether the petitioner was also named as an obligor in it.

To hold that the absence of the name of the petitioner as an obligor defeated the removal would be to sacrifice substance to form and would impose a requirement which has no basis in reason.

And that such could not have been the intention of the act is conclusively shown by reference to the next preceding section (section 2), as pointed out by Judge DRUMMOND in *Public Grain & Stock Ex.* v. *W. U. Tel. Co.*, *supra.*

In section 2, as it was in the original act (act of 1875), which immediately precedes the section in question, it was provided that "*either* party may remove said suit," etc., and such was the case until by the amendment of 1887 the right of removal was limited to "*any defendant* or *defendants* therein." Under this section it has been uniformly held that until the amendment of 1887 *any* plaintiff *or* defendant might remove a case, and since the amendment, *any defendant.*

There was no exception made in either of these acts as to infants, persons *non compos*, or otherwise under disability, and it is clear that it was the intention of the acts by this broad language—"*either* party" and "*any* defendant or defendants"—to give the right to remove, as well to persons under disability and suing by next friend or guardian, as to any other plaintiff or defendant.

But an infant or a person *non compos*, or otherwise under disability, cannot "make" a bond if, as the Supreme Court of Illinois has held, the

bond must be "made" by the petitioner by becoming an obligor in, and signing the bond.

It is true that the next friend or guardian might become an obligor, but in such case the bond would not be made by the party plaintiff or defendant, who must be the petitioner, the infant or person under disability—and would be as much the bond of a person *other than the party petitioning*, as if it were executed by a third person.

It follows that on the construction given to this requirement by the Supreme Court of Illinois the right of removal given by the act would be wholly defeated in the very large class of cases in which infants, persons *non compos*, or otherwise under disability, might sue or defend—a result that would be manifestly unjust, and in fact absurd.

It is a familiar rule of construction that in giving construction to a particular provision of a statute, all the different provisions of the act should be considered, and that construction should be adopted, if possible, which will be consistent with and give full effect to these different provisions.

> *Bernier* v. *Bernier*, 147 U. S., 242, at p. 246.

Another familiar rule of construction is that the mere *letter* of a statute should yield to the intention.

> *Oakes* v. *National Bank*, 100 U. S., 239, at p. 244.

Still another rule of construction is that statutes should receive a sensible construction, and such as will avoid an unjust or absurd conclusion.

> *Lau Ow Bew* v. *United States*, 144 U. S., 47.

Applying these rules of construction to the provision in question, the result is plain.

The only ground for the construction requiring the bond to be signed by the petitioner as a condition of removal is the supposed necessity of giving a literal meaning to the language, "shall make and file."

But, as we have seen, the effect of this would be to impose a requirement without any reason for it, and, in addition to this, to wholly defeat the right of removal given by the previous section, which defines the right, in a large class of cases.

If, therefore, there is a possible construction of the provision which will avoid such result, that construction should be adopted, and for that purpose the court may disregard the mere "literal import" or "letter" and adopt such "sensible and reasonable" construction as is more consistent with the meaning and intention of the act.

That the construction for which we contend is a possible construction is conclusively shown by the fact that it was adopted by the two able Federal judges referred to, and has been uniformly followed by the different text-writers cited.

The recent case of *Powers* v. *Chesapeake & Ohio R. R. Co.*, 169 U. S., 92, which arose on another provision of the same section, is directly in point in this connection.

In that case, at the time the action was brought the case was not removable, by reason of the joinder as defendants of citizens of the same state as the plaintiff. After the principal defendant had pleaded to the declaration, the plaintiff discontinued as to the other defendants, citizens of the same state as himself. The remaining defendant

thereupon filed a petition for removal on the ground of diversity of citizenship, and the state court held that the petition came too late on account of the express provision of section 3, requiring the petition to be filed "*at the time, or at any time before the defendant is required by the laws of the state, etc., to answer or plead to the declaration or complaint.*"

This court, while expressly holding that the petition *was not filed within the time required by the language of section 3*, held that the case before it was within *the intention* of the previous section (section 2), which defined *the right*, and that a construction should be given the act which would give effect to this intention by preserving the right.

This court, stating its conclusion as to the construction to be given to the act for this purpose, said (p. 100):

"*The reasonable construction of the act of Congress*, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold *that the incidental provision as to time must, when necessary to carry out the purpose of the statute yield to the principal enactment as to the right*, and to consider the statute as in intention and effect permitting and requiring the defendant to file a petition of removal, as soon as the action assumes the shape of a removable case in the court in which it was brought."

Again, it is settled by repeated decisions of this court that, while the second section of the act, which defines the cases in which a removal may be had, is "jurisdictional," the third section, which prescribes the mode and time of obtaining it, is but "modal and formal," and, therefore, not jurisdictional.

Ayers v. *Watson*, 113 U. S., 598.

Hence, it has been held that even as to the petition provided for by section 3, where the petition is clearly defective, as *where it is not signed by the petitioner* (*Removal Cases*, 100 U. S., 457), the defect may be waived by failure to make the particular objection, or by long delay.

And, for the same reason, it has been held that if, *upon the face of the whole record of the state court*, sufficient grounds for removal are shown, but the petition is *insufficient in its allegations* of the jurisdictional facts, *the petition may be amended in the United States Court.*

Powers v. *Chesapeake & Ohio R. R. Co.*,
169 U. S., 92, at p. 101, and cases cited.

For the same reason it has been held that any informalities in the bond, *or even the bond itself, may be waived.*

Removal Cases, 100 U. S., 457.
Ayers v. *Watson*, 113 U. S., 598.

Under these authorities, it would seem clear that, even if it should be held that the bond was not in strict compliance with the statute, for the reason that the petitioner did not join as an obligor, the requirement as to the bond, *not being jurisdictional*, the bond was such a substantial compliance with the statute, that the defect would not prevent the jurisdiction of the Federal court attaching, and that the Federal court would have had power to allow an amendment by the substitution of a new bond, or otherwise, to cure the defect.

But, as the sole object of the bond had been met at the time the motion to remand was made, by the actual filing of the transcript and giving security for costs in the United

States court (Pr. Rec., 533), it would have been a useless act to require a new bond, and the United States Circuit Court, therefore, properly overruled the motion to remand.

See in this connection *People's Bank* v. *Ætna Ins. Co.*, 53 Fed. R., 161, which is directly in point.

Again, it would be an anomaly in law to hold, that the United States Circuit Court had power to authorize an amendment of a bond, or the substitution of a new bond by way of amendment, to cure the alleged defect, if any, in the bond, as it clearly would have; and at the same time to hold, that *it did not acquire jurisdiction because of the defect in the bond.*

In the opinion of the Supreme Court of Illinois, in giving the narrow construction it did to the provision in question, there is no reference to any of the authorities cited *supra*, or to the reasons on which they are based, (although these authorities were cited to the court in the brief for plaintiff in error), but that court rests its decision wholly on the *dicta* of two prior cases in the same court, which in turn give no reasons and make no reference to the authorities cited. See 173 Ill. at 449.

A reference to the two cases cited (*Weed Sewing Machine Co.* v. *Smith*, 72 Ill., 204, and *Cincinnati, Chicago & St. Louis Ry. Co.* v. *Monaghan*, 140 Ill., 474,) will show that they throw no light on the question under consideration, but that what was there said on the question was wholly unnecessary to the decision in the particular case, and therefore wholly by way of *dictum.*

An examination of these cases will also show that what was said in *Cincinnati &c., Ry. Co.* v. *Monaghan*, 140 Ill., 474, was wholly based on the supposed authority

of *Weed Sewing Machine Co.* v. *Smith*, 71 Ill., 204 (no other reason being given), and that *Weed Sewing Machine Co.* v. *Smith* was decided under the removal act of 1867. The requirement of the act of 1867, under which *Weed Sewing Machine Co.* v. *Smith* was thus decided, was, that the petitioner "*should offer good and sufficient surety* for his entry in such court," etc.

And this supposed *decision* of the question under consideration in *Weed Sewing Machine Co.* v. *Smith* was, therefore, directly contrary to the express decisions of this court, holding the like language in the act providing for bonds on writs of error and appeal to this court, that the justice "shall take good and sufficient surety," etc., does not require the plaintiff in error or appellant to join in the bond.

Brochett v. *Brochett*, 2 How., 238.
Scruggs v. *R. R. Co.*, 131 U. S., Appendix, cciv.

II.

IN THE VIEW THAT THE CASE ONLY INVOLVED A SINGLE CONTROVERSY, NEITHER THE NORTHERN TRUST COMPANY NOR THE AMERICAN TRUST AND SAVINGS BANK, WAS AN INDISPENSABLE, OR EVEN A NECESSARY PARTY TO THE CONTROVERSY, AND, IF EITHER OF THEM WAS, IT SHOULD NOT BE RANGED ON THE SAME SIDE OF THE CONTROVERSY AS THE PLAINTIFF IN ERROR, AND THE CASE WAS THEREFORE PROPERLY REMOVED TO THE UNITED STATES COURT.

The complainant, the Lake Street Company, being a citizen of Illinois, and the defendant, the Farmers' Loan and Trust Company, being a citizen of New York, the

Farmers' Loan and Trust Company admittedly had the right to remove the case on the ground of diversity of citizenship, unless the fact that the Northern Trust Company and the American Trust and Savings Bank were also made defendants, defeated that right.

Before considering the particular facts as to the relations and attitude of the Northern Trust Company and the American Trust and Savings Bank, with reference to the controversy, we will refer to certain rules settled by the decisions of this court concerning the subject of removal, and the authorities illustrating them.

THE RULES AS TO THE QUESTION OF JURISDICTION ON REMOVAL APPLICABLE TO THIS CASE AS SETTLED BY THE DECISIONS OF THIS COURT.

One well-settled rule is that the fact that particular defendants may be *proper parties* to the suit does not make their presence as parties to the suit material to the question of removal.

Under the decisions of this court, *proper* parties are divided for the purpose of jurisdiction into three classes: (1) *formal*, (2) *necessary* and (3) *indispensable* parties.

In *Williams* v. *Bankhead*, 19 Wall., 563, at p. 571, this court, Mr. Justice BRADLEY delivering the opinion, defined the three classes of parties as follows:

"The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree with-

out him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not at the option of the complainant.

The following cases, decided by this court, and in which the jurisdiction was sustained, further illustrate the rules as to the different classes of parties, applicable to the case before the court.

Wormley v. *Wormley*, 8 Wheaton, 421.
Carneal v. *Banks*, 10 Wheaton, 181
Mechanics Bank v. *Seton*, 1 Peters, 299.
Vattier v. *Hinde*, 7 Peters, 252.
Boone v. *Chiles*, 8 Peters, 532.
Union Bank of Louisiana v. *Stafford*, 12 How., 327.
Walden v. *Skinner*, 101 U. S., 577.

As to the class of *proper parties* known as *formal parties*, it is well settled that their presence as parties is immaterial on the question of jurisdiction.

Walden v. *Skinner*, 101 U. S., 577.
Bacon v. *Rives*, 106 U. S., 99.

Such formal parties are not however mere strangers to the controversy, having no relation to it.

The very fact that they are *proper* parties, implies that the complainant has the right to make them defendants *for the purpose of having them bound by the decree*, but their relation to the *main* controversy, as shown by the record, is such, that their presence as defendants is regarded as immaterial in determining the question of jurisdiction.

Thus, a party, made a defendant *in order that further relief may be obtained against him, consequential upon or in aid of the main relief*, although a *proper*, is only a *formal* party within the rule, and his citizenship will not defeat the jurisdiction.

Walden v. *Skinner*, 101 U. S., 577.
Bacon v. *Rives*, 106 U. S., 99.

We also contend that, on the question of Federal jurisdiction, the only parties whose citizenship will defeat the jurisdiction are *indispensable* parties, as distinguished from either *formal* or *necessary*.

Hence, in cases of *original* jurisdiction, the citizenship of either *formal* or *necessary* parties will not defeat the jurisdiction, if the *indispensable* parties have the requisite citizenship. In such case, whatever the citizenship of the merely formal or even necessary, as distinguished from indispensable parties, the court regards the suit as nevertheless one in which there is "a *controversy between* citizens of different states." In other words, the only real parties to "the controversy" within the meaning of the act defining the jurisdiction of the Federal courts, are the *indispensable* parties.

And for that reason, if a suit is brought in the Federal court, which shows on its face that there are other persons not made defendants, citizens of the same state as plaintiffs, who are merely *necessary* parties, it is nevertheless a suit in which the controversy is *between* citizens of different states, and the Federal courts will have *original* jurisdiction.

So where such *necessary* parties are made parties to the suit, their presence will not prevent the court *acquiring jurisdiction*, and if the objection is made to a de-

cree against them on the ground of their citizenship, the court will allow a dismissal as to them, and proceed to a decree as to the *indispensable* parties.

In *Horn* v. *Lackhart*, 17 Wall., 570, the court, Mr. Justice FIELD, said:

"The objection to the jurisdiction of the court, that two of the defendants were residents of Texas, the same state with the complainants, *was met and obviated by the dismissal of the suit as to them. They were not* INDISPENSABLE *parties; that is, their interests were not so interwoven and bound up with those of the complainants or other parties, that no decree could be made without necessarily affecting them. And it was only the presence of parties thus situated which was essential to the jurisdiction of the court.* The rights of the parties, other than the defendants who were citizens of Texas, could be and were adequately and fully determined without prejudice to the interests of those defendants. *And the question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented, they are* INDISPENSABLE *parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained, and the suit dismissed as to them.*"

For the same reason, as the cases cited by us *infra* show, the court, in determining whether a case is removable under the act of Congress, as a suit in which there is "a controversy *between* citizens of different states," will only regard the citizenship of *indispensable* parties. The citizenship of merely *necessary* parties, whom in cases of original jurisdiction the plaintiff could omit as defendants, without affecting the jurisdiction of the court, will not defeat the right of removal. Otherwise it would be in the power of the plaintiff to defeat the right of removal of the parties as to whom there is, in fact, "a controversy between citizens of different states", by

merely adding as defendants parties whom he would omit or dismiss as to, in cases of original jurisdiction.

The court in such a case looks to the substantial right intended to be given, and will not permit the plaintiff to defeat the right of removal given by the act, by merely adding as defendants, parties whom he might have omitted if he had chosen to bring the suit in the first instance in the Federal court, without affecting the jurisdiction.

And in *Barney* v. *Latham*, 101 U. S., 205, and *Blake* v. *McKim*, 103 U. S., 336, this court held, that the language "*a* controversy between citizens of different states" in the removal act, should be given the same construction which it had given to the like language in the statute defining the *original* jurisdiction of the Federal court—*a controversy to which the persons who are* INDISPENSABLE *parties to the suit on opposite sides were citizens of different states.*

The construction thus given to the language of the removal act, "a controversy between citizens of different states," which makes the citizenship of the indispensable parties the test, has been uniformly recognized, both by this court and different circuit courts.

We refer to the following cases sustaining the rule, and illustrating its application:

Barney v. *Latham*, 103 U. S., 205, at 214, 215, 216.

Blake v. *McKim*, 103 U. S., 336

Mitchell v. *Smale*, 140 U.S., 406.

McHenry v. *R. R. Co.*, 25 Fed. R., 67, 68.

N. Y. Const. Co. v. *Simons*, 53 Fed. R., 1, at 4, 5.

In *Barney* v. *Latham*, 103 U. S., 205, *supra* (a removal case), at 214-216, the Supreme Court said:

"We have endeavored to show that the land company was not an *indispensable* party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin and Massachusetts. Whether those defendants and the land company were not *proper* parties to the suit, we do not now decide. * * * A defendant may be a *proper*, but not an *indispensable*, party to the relief asked.

The reasons of the rule apply with the same force under the Act of 1888, as under the prior removal acts, and it has been equally applied under that act, as the cases cited *infra* show.

And the very cases in the briefs on the motion to dismiss, cited by counsel for defendants in error, decided by this court, expressly recognize the rule.

Thayer v. *Life Ass'n*, 112 U. S., 717, at 719.

Crump v. *Thurber*, 115 U. S., 56, at 60.

Wilson v. *Oswego T. Co.*, 151 U. S., 56, at 65.

Merchants' C. P. Co. v. *Ins. Co.*, 151 U. S., 368, at 382, 383.

Hanrick v. *Hanrick*, 153 U. S., 192, at 198.

Const. Co. v. *Cane Creek*, 155 U. S., 283 at 285.

It follows from these authorities that, in any view, to establish that the presence of either the Northern Trust Company, or the American Trust and Savings Bank should defeat the jurisdiction, it must be shown that they were indispensable, as distinguished from merely *formal* or even *necessary* parties.

We shall, however, contend hereafter that neither the Northern Trust Company, nor the American Trust and Savings Bank, was even a *necessary* party within the meaning of the rule.

THE CONTENTION OF DEFENDANTS IN ERROR THAT THE RULE AS TO THE PARTIES HAS BEEN CHANGED BY THE ACT OF 1888, AND THAT UNDER THAT ACT THE CITIZENSHIP OF MERELY PROPER PARTIES IS MATERIAL.

It is contended by counsel (Br. for Am- T. & S. B., on Mo. to Dismiss, 30) that the act of 1888 has changed the rule which, it is not disputed, prevailed under the act of 1875, and that under the act of 1888, if a resident defendant is only a *proper* party, his presence as a party prevents a removal by a non-resident defendant.

(1) Counsel's contention is directly contrary to the decisions in the following cases, in which it was expressly held, under the act of 1888, that, in determining whether there was a right of removal, the citizenship of merely *proper* parties was not material, but that the citizenship of *indispensable* parties only should be considered.

N. Y. Construction Co. v. *Simons*, 53 Fed. R., 1, at 3, 4 and 5. (JACKSON J.)

State of Missouri v. *Alt*, 73 Fed. R. 202, at 304.

Carver v. *Trust Co.*, 73 Fed. R., 9 at 12.

And in the following cases decided by this court cited *supra*, which arose under the act of 1888, the rule was recognized:

Merchants C. P. Co. v. *Ins. Co.*, 151 U. S., 368.
Hanrick v. *Hanrick*, 153 U. S., 192.
Const. Co. v. *Cane Creek*, 155 U. S., 283.

(2) The only difference between the act of 1888 and the act of 1875 which is relied on as showing that the act of 1888 changes the rule theretofore prevailing, is the insertion in section 2 of the later act of the following phrase in defining what suits are removable, viz., any suit "*of which the Circuit Courts of the United States are given jurisdiction by the preceding section.*"

The reasoning of counsel in support of this contention ignores the fact that the rule, that the citizenship of merely *proper* parties—who are not either *necessary* or *indispensable* parties, and are, therefore, regarded as *formal*, although *proper* parties—is wholly immaterial to the question of Federal jurisdiction, originated in and has been repeatedly affirmed by this court, in cases of *original* jurisdiction.

Walden v. *Skinner*, 101 U. S., 577, and cases cited.
Bacon v. *Rives*, 106 U. S., 99.

(3) On comparing the two acts, the reason for the insertion in section 2 of the act of 1888 of the clause relied on by counsel, is plain.

On reference to section 2 of the act of 1875 it will be seen that, in defining the cases in which a removal could be had, *that section specifically enumerated them, repeating in extenso the particular phrases used in section 1 of the act.*

But in section 2 of the act of 1888, after first specific-

ally providing for the removal of cases "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," Congress proceeded to provide for the removal of "any *other* suit."

And in so doing, instead of following the plan adopted in section 2 of the act of 1875, of *repeating in extenso all the particular phrases* used in section 1 of that act, Congress embodied all these particular phrases in section 2 of the act of 1888, by means of a reference to section 1 of the same act, by using the *general* language, viz., "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section"—in which preceding section (section 1 of the act of 1888) the identical language used in section 2 of the act of 1875, in conferring the right of removal, viz.: suits "*in which there shall be a controversy between citizens of different states*," is made use of.

The obvious purpose of Congress in employing the general phrase in section 2 of the act of 1888, relied on by counsel, *was merely to simplify and shorten section 2 of the act of 1888, by including in it, by reference, the different particular phrases, which, in section 2 of the act of 1875 (the removal section of that act), were repeated at length in the same language.*

We submit that if Congress, in passing the act of 1888, had intended to make any such radical and sweeping change in the law as counsel contend, it would (as it could easily have done) have used plain language to express such intention, and to restrict the jurisdiction on removal within the narrow limits contended for by counsel.

THE RULE AS TO ARRANGING PARTIES.

A second well-settled rule is thus stated in the *Removal Cases*, 100 U. S., 469, where it is said:

"When the *controversy*, about which a suit in the state court is brought, is between citizens of one or more states on one side and citizens of other states on the other side, either party to the controversy may remove the suit to the Circuit Court *without regard to the position they occupy in the pleadings* as plaintiffs or defendants. For the purposes of a removal *the matter in dispute* may be ascertained and the parties to the suit *arranged on opposite sides of that dispute*. If, in such arrangement, it appears that those on one side are all citizens of different states from those on the other, the suit may be removed."

And that the same rule, as to arranging parties, applies as well to suits originally brought in the United States Courts, was expressly held in *Pacific R. R.* v. *Ketchum*, 101 U. S., at 297, 298.

For other statements of the rule, and further cases illustrating its application see:

Barney v. *Latham*, 103 U. S., 205.
Harter v. *Kernochan*, 103 U. S., 562.
Carson v. *Hyatt*, 118 U. S., 279.
Evans v. *Watson*, 156 U. S., 527.

THE NORTHERN TRUST COMPANY WAS NOT AN INDISPENSABLE OR EVEN A NECESSARY PARTY TO THE SUIT..

1. There is no dispute that all the allegations of alleged wrongdoing are *against* the Farmers' Loan and Trust Company alone, and that the only relief sought is *against* the Farmers' Loan and Trust Company—its removal as trustee and an injunction against *it*, enjoining it from bringing or prosecuting a suit for foreclosure, etc.

The question is thus stated by counsel:

"The question is whether the defendants [The Northern Trust Company and American Trust and Savings Bank] were necessary and indispensable parties, and, *on the assumption that they had not answered*, then in such case, *if they were necessary and indispensable parties, the cause was not removable.*" (Br., 33.)

And in view of the fact that it *indisputably appears from the record that both the Northern Trust Company and the American Trust and Savings Bank were actually and in fact ranged on the same side of the matter in controversy as the complainant* (see *infra*), counsel repeatedly invoke and insist on the rule that the question of jurisdiction must be determined from the facts, as appearing in the record at the time the petition was filed—*the allegations of the bill and the petition—and not from the actual facts as shown in the progress of the suit.* (Br. for Lake St. Co., 20, 33, 37.)

The petition for removal expressly alleges that the Northern Trust Company is not a *necessary* party. (Pr. Rec., 32.)

To defeat the jurisdiction on account of the presence of the Northern Trust Company as a defendant, it must, therefore, be shown that it appears *from the allegations of the bill* that it has such a direct interest in the actual controversy as makes it an indispensable party, or at least a necessary party.

The fact of this interest is an affirmative fact which should appear by affirmative allegations.

The Northern Trust Company is nowhere mentioned, either in the stating or charging part of the bill.

The first mention of it is in the *prayer for relief*, as follows:

"Forasmuch, therefore, as your orator is remediless in the premises, except in a court of equity," etc., "your orator files this its bill of complaint, and *makes* the Farmers' Loan and Trust Company, the American Trust and Savings Bank, and the Northern Trust Company, *the holder of over 6,500 bonds issued under said mortgage, * * * parties defendant* to this its bill of complaint, and *prays*," etc.

Except that it is also named in the *prayer for summons*, this is the only mention of the Northern Trust Company throughout the bill.

The question, therefore, is whether the addition, after the name, of the description "the holder of over 6,500 bonds" in the *prayer*, was such an issuable *allegation of fact* that it can be said that the record showed, as an affirmative fact, that the Northern Trust Company was the holder of over 6,500 bonds, and was therefore such an indispensable or necessary party that its presence defeated the right of removal.

There can be no claim that these words of description, added after the name in the *prayer*, constituted such an *allegation of fact* as showed that the Northern Trust Company was either a necessary or indispensable party under the rules of pleading. And there can be no question that if, on such a bill, the Northern Trust Company had filed a demurrer, on the ground that the bill did not show by issuable averments such facts as made it either an indispensable or necessary, or even proper party, such demurrer would have been sustained; and that therefore the bill, unless amended, would have been dismissed as to it.

And it is submitted that the same phrase in the same bill should not be given a different legal effect in determining the same question—whether the allegations of the bill showed such an *interest* as made it a necessary or

proper party—on objection to the application for removal.

2. But if we assume that these words of description are to be treated as an *allegation of fact*, the only interest which they show in the Northern Trust Company is that of a bondholder. One of the main grounds on which it is contended by counsel that the American Trust and Savings Bank was a necessary party to the suit in the allegations of the bill is, that it was made a defendant as *the representative of the bondholders*. (Br. for Am. T. and S. B., 28.) If this position of counsel is sound, then it would follow that the Northern Trust Company as a bondholder would be at the most only a *proper* party, since on the theory that its in terests were *represented* in the suit by the trustees, one or both, it would be in no view a necessary party.

IF, HOWEVER, IT IS ASSUMED THAT THE NORTHERN TRUST COMPANY HAD SUCH A RELATION TO THE CONTROVERSY AS MADE ITS CITIZENSHIP MATERIAL, IT SHOULD NOT BE RANGED ON THE SAME SIDE OF THE CONTROVERSY WITH THE FARMERS' LOAN AND TRUST COMPANY.

On the assumption, which is necessary to make the question material, that the words of description quoted are to be treated as an affirmative averment that the Northern Trust Company was "the holder of over 6,500 bonds," the other allegations of the bill are to be read in connection with it as such averment of fact.

The bill alleges that 7,574 bonds were issued under the mortgage (Pr. Rec., 7); that the complainant "has been unable to earn sufficient money" to pay the interest on its mortgage, and that it has not paid the installments of inter-

est coming due July 1, 1895, and January 1, 1896; that one William Zeigler and his associates hold 610 bonds, and have made demands on the trustees to take action on account of the defaults in interest; that no bondholders, other than those holding the 610 bonds, were asking the trustees to take any action. (Pr. Rec., 7, 8.)

The bill then avers that "the holders *of 6,574 bonds* issued by your orator under said mortgage *especially requested* said the American Trust and Savings Bank and said the Farmers' Loan and Trust Company *to take no action whatsoever* with reference to the failure of said company to provide for or to pay the interest upon the coupons due July 1, 1895, and January 1, 1896." (Pr. Rec., 8.)

It further alleges (Pr. Rec., 8–9,) that

"it is the desire and wish of *the holders of over 6,500 of the bonds* of complainant, issued under and by virtue of said trust deed, that said Farmers' Loan and Trust Company *should be removed from its position as trustee* under said mortgage, *first*, for failure to comply with the laws of Illinois, and, *second*, for assuming to act or to take proceedings under said mortgage, *contrary to and in violation of the request of the holders of a majority of the bonds.*"

It is clear from these allegations of the bill that, if the *recital* in the prayer is to be taken as an issuable *averment* that the Northern Trust Company was the holder of over 6,500 of the total of 7,574 bonds, the bill must be taken as in reality expressly alleging

(1) That THE NORTHERN TRUST COMPANY "*especially requested*" the trustees "to take no action whatever" on account of the admitted defaults in interest;

(2) "That it is the desire and wish" OF THE NORTHERN TRUST COMPANY that "said Farmers' Loan and Trust Company should *be removed from its position as*

trustee," for the reasons alleged,—one of which was "*assuming to act contrary to and in violation of the request of the holders of a majority of the bonds*"—that is *of* THE NORTHERN TRUST COMPANY.

Thus reading these particular allegations, the bill shows these facts as to the matter in controversy, and the relation and attitude of the Northern Trust Company with reference to it:

(1) That the complainant, the Lake Street Company, was in default in the payment of two installments of interest due on the mortgage. (Pr. Rec., 8.)

(2) That, *on the one hand*, the holders *of 610 of the bonds* made a demand in writing on the two trustees, the Farmers' Loan and Trust Company and the American Trust and Savings Bank, *to take action to foreclose* the mortgage, or otherwise to enforce the security *on account of the non-payment of the two installments of interest.* (Pr. Rec., 7.)

(3) That, *on the other hand*, the holders of 6,574 of the 7,574 bonds, *including* THE NORTHERN TRUST COMPANY, *holding 6,500*, "*especially requested*" the two trustees, the Farmers' Loan and Trust Company and the American Trust and Savings Bank, "TO TAKE NO ACTION WHATSOEVER" *under said mortgage* "*with reference to the failure of said company to provide for or pay*" *the two over-due installments of interest.* (Pr. Rec., 8.)

(4) That, *on the one hand*, the Farmers' Loan and Trust Company, "*notwithstanding*" *no other* bondholders than the holders *of the 610 bonds* have made any demand on the trustees to take action," "*in violation of duty*," *intends to and will, unless restrained*, proceed to

take possession of *or attempt to foreclose said mortgage.*" (Pr. Rec., 8.)

(5) That, *on the other hand*, the American Trust and Savings Bank, "*in compliance with such request*" of the NORTHERN TRUST COMPANY, "*did decline and refuse to join with* said the Farmers' Loan and Trust Company IN ANY PROCEEDINGS WHATSOEVER to enforce the provisions or conditions of said mortgage *on account of the failure of your orator to pay the said interest as aforesaid.*" (Pr. Rec., 8.)

(6) That "*it is the desire and wish*" of THE NORTHERN TRUST COMPANY, as "holder of over 6,500 bonds" issued under the mortgage, that the Farmers' Loan and Trust Company "BE REMOVED FROM ITS POSITION AS TRUSTEE *first*, for failure to comply with the laws of the State of Illinois, and *second*, for *assuming to act or take proceedings under said mortgage* CONTRARY TO AND IN VIOLATION OF THE REQUEST OF *the majority of the bonds.*" (Pr. Rec., 8, 9.)

These allegations constitute a large part of the bill, and their materiality to the controversy is further conclusively shown by the express findings of each of the facts thus alleged in the decree itself and on which the decree is based. (Pr. Rec.,94-99.)

We submit that, in view of these allegations and under the rule as to ranging parties, the Northern Trust Company should not be ranged on the same side of "the matter in dispute" as the plaintiff in error, but on the side of the complainant, the Lake Street Company.

Clearly the "matter in dispute" is as to the claim of the complainant, the Lake Street Company, to have the Farmers' Loan and Trust Company removed as trustee,

and an injunction enjoining it from taking action to foreclose, etc.

As we have seen, no relief is prayed against the Northern Trust Company.

As to the removal of the Farmers' Loan & Trust Company as trustee, the bill expressly alleges that the NORTHERN TRUST COMPANY, as the holder of a majority of the bonds, *desires its removal*, for the reason, first, that it has not made the deposit claimed to be required by the statute, and, second, its alleged wrongful action in taking proceedings under the mortgage "*contrary to and in violation of the request of the holders of a majority of the bonds*," *the Northern Trust Company.*

And the injunction sought is an injunction *against the Farmers' Loan and Trust Company* to enjoin it, the Farmers' Loan and Trust Company, from doing what the bill expressly alleges *the Northern Trust Company*, as a holder of the majority of the bonds, has asked it NOT TO DO, AND HAS OBJECTED TO ITS DOING.

See, in this connection, as particularly analagous in the facts as to the ranging of the parties, *Harter* v. *Kenochan*, 103 U. S., 562.

This construction of the different allegations of the bill as to the attitude of the Northern Trust Company, and its relation to the controversy, is decisively confirmed by the facts shown in the record as to its actual attitude with reference to the "matter in dispute."

That in determining on which side of "the matter in dispute" a party should be ranged, his actual attitude as shown in the record, may properly be considered by the court, see authorities cited and quoted *infra.*

And that this subsequent action is also material for other

reasons, see our discussion of the question as to the American Trust and Savings Bank, *infra.*

The record shows the following facts as to the actual attitude of the Northern Trust Company:

(1) In its answer to the bill it denies none of its allegations, but *expressly admits the particular material allegations denied by the plaintiff in error, Farmers' Loan and Trust Company by its answer.* It also expressly avers that "it is informed that it is true that said Farmers' Loan and Trust Company HAS NEVER COMPLIED WITH THE LAWS OF ILLINOIS IN RELATION TO TRUST COMPANIES, AND FURTHER THAT DEFENDANT BELIEVES IT TO BE TRUE THAT THE SAID FARMERS' LOAN AND TRUST COMPANY HAS BEEN DOING BUSINESS IN THE STATE OF ILLINOIS WITHOUT HAVING MADE THE DEPOSIT WITH THE AUDITOR AS REQUIRED BY THE LAWS OF ILLINOIS." (Pr. Rec., 37.)

It does not deny the express allegation of the bill that it is its "desire and wish" that the Farmers' Loan and Trust Company be removed as trustee. On the contrary, it avers that "*it is advised by its counsel that said Farmers' Loan and Trust Company, having failed to comply with the laws of the State of Illinois as aforesaid,* IS NOT COMPETENT TO ACT AS TRUSTEE UNDER SAID TRUST DEED." (Pr. Rec., 37.) And the materiality of these express admissions is made still clearer by the fact that it was on the precise ground here admitted—that the plaintiff in error *had not complied with the laws of Illinois in relation to trust companies*—that the court decreed that the plaintiff be removed as trustee, etc. (Pr. Rec., 98.)

(2) On the hearing of the case, it offered no evidence in opposition to the bill, but, on the contrary, by its counsel, Mr. Judah, in the course of the com-

plainant's case, it examined two of the witnesses who testified on behalf of the complainant and in support of the bill. (Pr. Rec., 362-412.)

(3) On the appeal to the Supreme Court of the state, it appeared by its counsel and filed a brief *in favor of the affirmance of the decree against the Farmers' Loan and Trust Company on the merits.* (See 173 Ill., at 448.)

THE AMERICAN TRUST AND SAVINGS BANK WAS NOT AN INDISPENSABLE, OR EVEN NECESSARY PARTY, BUT AT MOST A PROPER PARTY.

Beyond the allegations which set out the making of the trust deed, the only allegation in the bill as to the American Trust and Savings Bank is the following:

"That said American Trust and Savings Bank, *in compliance with such request* [of the holders of 6,574 bonds], and after a full examination of the affairs of said company, did, on the 28th day of January, 1896, DECLINE AND REFUSE TO JOIN WITH *said The Farmers' Loan and Trust Company* IN ANY PROCEEDINGS WHATSOEVER *to enforce the provisions or conditions of said mortgage on account of the failure of complainant to pay the said interest as aforesaid.*" (Pr. Rec., 8):

The controversy presented by the bill arises wholly on allegations and charges made against the plaintiff in error, the Farmers' Loan and Trust Company.

And the relief sought, the removal of the particular trustee, the Farmers' Loan and Trust Company, and the injunction enjoining it from filing a bill to foreclose etc., is solely *against* the Farmers' Loan and Trust Company.

No allegation is made and no relief is asked against the American Trust and Savings Bank.

The American Trust and Savings Bank admittedly has no *beneficial interest* in the subject-matter of the contro-

versy, its sole relation being that of a *trustee* under the mortgage.

Neither the bill nor the decree based on it sought to affect in any way the title and powers *vested in it* by the mortgage.

The primary and substantial relief sought, viz: the removal of the Farmers' Loan and Trust Company as one of the trustees, and an injunction against the Farmers' Loan and Trust Company filing a bill to foreclose, *only related to and could only affect in any legal sense the title and powers vested in the Farmers' Loan and Trust Company.*

It is argued in the brief for the American Trust and Savings Bank, filed on the motion to dismiss, that under the statutes of Illinois the title vested in the American Trust and Savings Bank was that of a *joint* tenant, and not of a tenant in common, and that, therefore, any suit affecting the title of the Farmers' Loan and Trust Company would affect its title, and that for that reason it is a *necessary* party. (See Br. for Am. T. & S. B. on Mo. to Dismiss, 23.)

In the first place, it will be seen that the only contention is that this joint tenancy would make the American Trust and Savings Bank a *necessary* party and not an *indispensable* party, which, as we contend (see authorities, *supra*), would be necessary to prevent the removal.

But secondly, this reasoning, would not only make the determination of a substantial right—the right of removal under the Federal constitution and laws—depend on a legal distinction as to the kind of title held, not material to the actual relation of party to the *controversy;* but it is based on an erroneous view of the law.

Stephen v. *Beall*, 22 Wall., 329, is directly in point.

In that case, one of four *joint* tenants made a deed of trust (a mortgage) of land which had been conveyed *to the four*—the deed of trust purporting to convey the whole estate. On a bill filed to have the land sold under the deed of trust, to which the one joint tenant who made the trust deed was made defendant, it was contended that the three other joint tenants who did not join in the conveyance were necessary parties defendant to the bill.

This court, in holding that they were not necessary parties, say:

"Mrs. Beall was the owner of one-fourth of the property referred to, and no more. * * * *No relief was asked against the children, and no claim made by the trustees that their rights were affected by the deed of their mother.* * * * *No judgment could be taken against the children, or that would affect their estate, nor would a sale of their interest have any legal effect.* * * * It is said, however, that as the law of Maryland stood in 1801, and was thence carried into the District of Columbia, the conveyance to Mrs. Beall and her children *created a joint tenancy*, and that *being a joint tenant*, her conveyance in 1857 did not bind her interest only, but *affected, also, that of her co-tenants.*

We cannot recognize this conclusion. [Citing authorities.]

We think it clear upon these authorities that the attempted conveyance by Mrs. Beall of the entire premises *had no effect upon the interests of her co-tenants, conceding them to have been joint tenants.*"

If the American Trust and Savings Bank is an indispensable or even necessary party to this suit for the removal of the Farmers' Loan and Trust Company as trustee, it must be on the ground that its presence as a party is necessary *as the representative of the bondholders under the doctrine of representation.*

While, for many purposes, and in many, if not most suits, which may affect the trust property, a trustee under a trust deed represents the *cestuis que trustent*, and *the cestuis que trustent* will, therefore, be bound by a decree for or against the trustee in such suits, it is clear that the trustee does not represent the *cestuis que trustent* in every controversy which may affect their interest under the trust deed.

Thus, *on a bill to have the bonds surrendered*, the trustees do not represent the bondholders, as was expressly held by the Supreme Court of Pennsylvania in the case of the *Appeal of Harrisburg & Eastern R. Co.*, 36 Am. & Eng. R. R. Cas., 249.

So it is a well-settled rule that the *cestuis que trustent* themselves are *necessary* parties *to a bill to remove a trustee*, and are not therefore represented by the trustee.

1 Perry on Trusts (4th Ed.), Sec. 282.
Hill on Trustees (4th Am Ed.), star p. 195.
Bear v. *Am. R. Tel. Co.*, 36 Hun, 400.

And this was expressly held by the state Appellate Court in considering another branch of the case (68 Ill. App., 675).

No doubt where the *cestuis que trustent* are very numerous, and there are a sufficient number before the court as defendants to sufficiently represent all, it is not necessary, under the doctrine of representation, to bring in the remaining *cestuis que trustent* in order to bind them.

Whether in a particular suit the trustee can sue and defend *as the representative* of the *cestuis que trustent*, or the beneficiaries themselves, must be made parties—

either all, or, if numerous, a sufficient number to adequately represent all—necessarily depends on the nature of the controversy and the terms and provisions of the trust deed defining the duties and powers of the trustee.

Kerrison, assignee, v. *Stewart et al.*, 93 U. S., 160.

The trust deed in question is in the usual form of railroad mortgages, and there is no doubt that in suits to enforce its provisions by foreclosure of the mortgage, or in suits brought by strangers affecting the title, the trustees would represent the bondholders. But the precise question here is whether *in a suit for the removal of one of the trustees from the trust*, the trustees, one or both, are, under the provisions of the trust deed, representatives of the bondholders defending on their behalf.

That the Farmers' Loan and Trust Company *could not represent the bondholders* in the suit for its own removal in the sense contended for—that the bondholders not before the court or otherwise represented would be bound by a decree against it—would seem clear.

And that the American Trust and Savings Bank was not made the representative of the bondholders in the suit for the removal of its co-trustee, is equally clear for various reasons.

(1) The rule is, as we have seen, that in a suit for the removal of a trustee the *cestuis que trustent themselves* (either all, or a sufficient number to represent all) are necessary parties, and are not represented by the trustees, who, in other suits, and for other purposes, on familiar principles, would represent them. And the same rule which would make them necessary parties to a suit for the removal of a sole trustee, would make them

necessary parties for the removal of one of two trustees. And it follows that, if in such a suit the bondholders themselves are necessary parties, entitled to be heard as such, neither one nor both of the trustees is their representative in the suit.

(2) There is no power given in the trust deed to either one of the trustees to remove the other, or to act in any way on the subject of its removal.

It is true that there is a provision that *in case of the removal* of one of the trustees, the co-trustee shall have the power *to appoint a successor*, but this power of appointing a new trustee, *after the removal* of one of those appointed by the instrument, is manifestly a wholly different one *from that of removing the trustee.*

The cases, therefore, in which it was held that the trustee—acting with reference to matters as to which it is given power to act, and as to which its duties are defined by the trust deed itself,as in case of foreclosure—represents bondholders, have no application.

(3) It will be seen that the particular suit was in fact a suit between one of the *cestuis que trustent* and one of the trustees—the trustees as well for the Lake Street Company, the mortgagor, as for the bondholders. There is a recognized distinction between a suit between the *cestuis que trustent* and the trustees, and a suit between *strangers* and the trustees. (*Kerrison* v. *Stewart*, *supra*). While in the latter case the trustees are regarded as the representatives of the *cestuis*, in suits with reference to the trust property, the rule is different where the suit is between the *cestuis que trustent and the trustees*, or one of them.

(4) As said in the briefs for defendants in error, all

the powers given by the trust deed are *joint* powers requiring joint action in their exercise. In this suit for the removal of one trustee it would seem plain, that the trustee sought to be removed could not represent the bondholders, in the sense that its action as a party to the suit would bind them.

Clearly in such an action the trustee sought to be removed would be a defendant not in his representative, but in his individual capacity, defending himself against removal from the office. And it would follow that the other trustee, whose only powers and duties under the trust deed are joint, could *not as a single trustee* represent the bondholders.

The very fact that the suit was brought for the removal of *one* of the two trustees, and that the precise and only question it presented, was as to the removal of *one*, shows that it was not within the scope of the only representation contemplated by the trust deed, which was *joint*.

(6) The question of the removal of a particular trustee would naturally be one as to which the bondholders might disagree, and in this very record we have the precise case presented, of one class of bondholders asking the removal of one of the trustees, and this very request alleged as one of the grounds of removal; and another class opposing such removal. Suppose in the case before the court, that the American Trust and Savings Bank, having the duty of representing the bondholders, had decided to file an answer taking affirmative ground in favor of the removal.

Would the presence of the American Trust and Savings Bank in the case, presenting the attitude by its answer, of

asking the removal, have bound those of the bondholders who might be opposed to removal?

(7) On the record, what bondholders does the American Trust and Savings Bank represent? Does it represent *all?* If not, what becomes of the theory of representation of the bondholders under the trust deed? If it does not represent all, which of the two classes, those in favor of the removal of the Farmers' Loan and Trust Company, or those against, does it represent? On the theory of complainant, the bondholders who are alleged to be in favor of the removal are before the court as defendants representing themselves. On the face of the bill, therefore, there was no occasion for making it a party to *represent* the bondholders favoring the removal, and it was not, therefore, a necessary party for that purpose. On the other hand, there is no allegation in the bill that it is opposed to the removal.

And its answer filed to the bill, shows affirmatively that it is not in court representing those against removal, and that if they are to have any protection in the suit, it is by the action of the Farmers' Loan and Trust Company itself in defending.

We submit that the American Trust and Savings Bank has no such interest in or relation to the *actual controversy*, as makes it even a *necessary*, much less an *indispensable*, party to the suit, so that its citizenship will defeat the jurisdiction of the Federal court.

So far as the bill seeks, in addition to the removal of the Farmers' Loan and Trust Company as trustee, an injunction against its further action as such trustee, in the view now under discussion—viz: that the bill presents but a single controversy—the controversy as to the re-

moval of the trustee—the injunction, as counsel for defendant in error contend, is manifestly only an incident in this main relief.

It is said, however, that the bill also seeks the appointment of a new trustee, and reference is made to the fact that the bill prays that "a new trustee may be appointed *by the court.*" And it is argued that on this account the American Trust and Savings Bank is "a necessary and indispensable party" to the suit. (Br. for Am. T. and S. B. on Mo. to Dismiss, 26.)

(1) The "dominating purpose" of the bill being, as counsel for the American Trust and Savings Bank contends, the removal of plaintiff in error (Br., for Am. T. and S. B. on Mo. to Dismiss, 12, 15.) the question whether, on the allegations of the bill complainant was entitled to have plaintiff in error thus removed, was manifestly the real matter in controversy. It could only be *after this controversy had been decided* by the court that the question as to the appointment of a new trustee could arise.

The question as to whether, as a consequence of the removal, this appointment should be made by the court, or by the American Trust and Savings Bank, was necessarily a question with which plaintiff in error had nothing to do. It had no interest in it.

The fact that there *might be*, as argued by counsel, a further subsequent controversy as to whether the appointment should be by the court, or by the American Trust and Savings Bank, or as to who the new appointee should be, did not make the American Trust and Savings Bank an *indispensable* or even *necessary* party to the *main* controversy as to the removal of plaintiff in error.

This is clearly shown, not only by the fact, that plaintiff in error, against whom concededly the principal relief was sought, had no interest in, or relation to this possible question, as to who should be it successor, and that the question, if any, could only arise after the removal of plaintiff in error, but also by the fact that it could as well have been made the subject of an independent bill for the appointment of a new trustee, *after* the entry of a decree granting the relief prayed against appellant.

And this is made the clearer by the fact, that under the trust deed set out in the bill, the power to appoint the new trustee was expressly vested in the co-trustee, the American Trust and Savings Bank, and therefore no controversy could arise as to the appointment, not only until after the removal, but also until after a refusal by the American Trust and Savings Bank to appoint the successor, as to which it is to be presumed it would perform its duty by making the appointment.

Gibson v. *American Loan & Trust Co.*, 58 Hun, 443.

In addition to this, the trust deed further provided (Pr. Rec., 26) that, if the co-trustee did not fill the vacancy within thirty days, then the power of appointment should be vested in "any judge of the United States Circuit Court for the Seventh Circuit." These judges, although having such power of appointment, were not made defendants, and it follows that the proper proceeding to appoint a successor would be a new suit begun after the co-trustee and the judges declined or neglected to act.

That the fact that a party is made a defendant in order

that further relief may be obtained against him, *consequential upon a decree granting the main relief*, does not make him a necessary party, so that his presence will defeat the jurisdiction, is settled by the express decisions of this court.

Walden v. *Skinner*, 101 U. S., 577.
Bacon v. *Rives*, 106 U. S., 98.

(2) It is manifest, that the question whether a particular defendant has such an interest in, and relation to a controversy, that his citizenship is material to the jurisdiction, is not to be determined by the fact that *particular relief* is *prayed* against him, but from the *allegations of the bill, and the facts shown by them*, as to the actual matter in controversy, and the relation of the different parties to it.

Otherwise it would always be in the power of a complainant to defeat the right of removal, by *praying for* particular relief against a defendant whose citizenship would defeat the jurisdiction, *without reference to the case made by the bill*, and whether there was any foundation whatever in its allegations for the particular relief prayed.

McHenry v. *R. R Co.*, 25 Fed. R. 65.
Dow v. *Bradstreet*, 46 Fed. R. 577.
Shepard v. *Bradstreet*, 65 Fed. R. 142.
Landis v. *Felton*, 73 Fed. R. 311, 313.
Warax v. *Ry. Cy.*, 72 Fed R. 637.
Rivers v. *Bradley*, 53 Fed. R. 305.
Ferguson v. *R. R. Co.*, 63 Fed. R. 177.
Brown v. *Murry Nelson & Co.*, 43 Fed. R. 614.
Overman Wheel Co. v. *Pope Mfg. Co.*, 46 Fed. R. 577.

The trust deed which is made an exhibit to the bill, and by express allegation is made part of it (Pr. Rec., 5), contains this provision:

"In case at any time hereafter either of the said trustees, or any trustees hereafter appointed, shall die or resign, *or be removed*, or otherwise cease to act or become incapable of acting, *the successor or successors of such trustee shall be appointed by the surviving or remaining trustee* by an instrument in writing subscribed by it, or *if there be* none, then by the railroad company by an instrument in writing under the seal of said company." (Pr. Rec., 26.)

It is perfectly clear that this power is a power, the exercise of which a court of equity cannot deprive the bank of, or interfere with, limit or control, unless on a bill *setting up the existence of such a state of facts as would justify such action on the part of the court.* And the same is true as to the power of the judges to appoint.

1 Perry on Trusts, Sec. 487.

Golden v. *Bressler*, 105 Ills., 410, at 431.

No such state of facts is alleged by the bill to exist, and no court could properly hold that, on the allegations of the bill, the bank's power to appoint a successor could be taken away or interfered with.

But in point of fact the court below did not appoint a trustee, but *under the prayer for general relief* only directed the American Trust and Savings Bank to do what it was made its duty to do by the provisions quoted, and that it is to be presumed it would have done without any decree—appoint the new trustee in place of the Farmers' Loan and Trust Company which its decree removed.

(3) It is argued that the bill was brought "to *change the contract*" (Br. for Lake St. Co. on Mo. to Dismiss,

35), by having a new trustee appointed "contrary to the contract."

As we have before said, the nature of the controversy presented by the bill must be determined by its allegations, and the theory of the bill as there shown, rather than the mere *form of the prayer* for particular relief—particularly as there was added the prayer for general relief, under which any relief consistent with the allegations of the bill could be decreed. These allegations, so far from showing any claim "to change the contract," make the trust deed an exhibit to the bill, and proceed wholly upon the theory of the enforcement of the alleged duties of the trustees under the trust deed and the rights of complainant on account of alleged violations of those duties.

Under these allegations which set out the provision of trust deed giving the power of appointment to the co-trustee, there could be no appointment at all until *plaintiff in error* was first removed by final decree.

And no controversy as to such appointment could arise until after not only the removal of the trustee, but also until the American Trust and Savings Bank and the judges referred to *after such removal*, shall refuse to perform the duty imposed by this provision of the trust deed referred to, which it is to be presumed they would not do.

THE AMERICAN TRUST AND SAVINGS BANK SHOULD NOT BE RANGED ON THE SAME SIDE OF THE CONTROVERSY WITH THE FARMERS' LOAN AND TRUST COMPANY, AND FOR THAT REASON ITS PRESENCE AS A DEFENDANT SHOULD NOT DEFEAT THE REMOVAL.

On the theory that there is but *one* controversy in the suit (to use the language of counsel for the American Trust and Savings Bank), "the dominating purpose of the bill was the removal of the Farmers' Loan and Trust Company as trustee" (Br., 12, 15), and the further relief of an injunction to enjoin it from filing a bill to foreclose, and for the appointment of a new trustee *in case of, and after such removal*, was merely subsidiary and incident to the main controversy as to the removal of the trustee. (Brief of Am. T. & S. B. on Motion to Dismiss, 17-18.)

There is no pretense of any allegations in the bill that the American Trust and Savings Bank had taken any attitude, or otherwise expressed itself *in favor of, and as on the side of the Farmers' Loan and Trust Company* in this controversy.

Nor does the bill make any allegation of any request to or refusal by the American Trust and Savings Bank, to join in the bill, or that it is otherwise opposed to the relief sought, and no relief is asked against it.

We have already shown that, on the assumption on which the question as to the side on which the American Trust and Savings Bank should be ranged arises—that it is an indispensable or at least necessary party to the controversy—there is no provision in the trust deed which defines its duty in the event of such a con-

troversy, as to the removal of its co-trustee, directing or controlling its action as to which of the two sides of the controversy it should take. And it follows that, on the assumption that it is in the suit as the representative of the bondholders or otherwise in its capacity as trustee, (as it must be, since it has no beneficial interest) it would have the right and power, and would therefore be subject to the duty to decide, on which side of the controversy to range itself according to the facts.

And it also follows that, in the absence of any affirmative allegations as to the attitude of the American Trust and Savings Bank, the court should presume that it had actually taken, or would take, the side in the controversy which, under the facts alleged, it would be its duty as trustee to take.

We submit that on the allegations of the bill, which are to be taken as true for the purpose of this question, it was the plain duty of the American Trust and Savings Bank not to take the side of the Farmers' Loan and Trust Company, by opposing the removal, but of the complainant and the majority of the bondholders in favor of the removal.

And this duty is made still clearer by the express allegation of the bill, that it was "the desire and wish of the holders of over 6,500" of the total of 7,574 bonds, that the Farmers' Loan and Trust Company "should be removed from its position as trustee under said mortgage," *because of the facts alleged in the bill.*

But in fact the allegations of the bill show affirmatively that the American Trust and Savings Bank had ranged itself not on the side of, but against the Farmers' Loan and Trust Company, in the controversy.

As we have already shown, the allegations of the bill *clearly* show the two sets of bondholders taking opposite sides as to the matter in controversy, *the holders of the 610 bonds* demanding that the trustees *take action to enforce the mortgage* for the admitted defaults in interest, and the *Northern Trust Company* holding "over 6,500 of the bonds," "*especially requesting*" them "*to take no action whatever.*"

The allegations made against the Farmers' Loan and Trust Company are, in substance, that it threatens and intends *at the request of the 610 bonds*, and *notwithstanding the request of the Northern Trust Company* holding the majority of the bonds, "to take *no action whatever*" to proceed either to take possession or file a bill for foreclosure.

This threatened action by it is expressly characterized by the bill as "in violation of its duty," and "the desire and wish" of the holders of the 6,500 bonds, *the Northern Trust Company*, that it be removed as trustee "for assuming to" take this threatened action, "contrary to and in violation of the request of the holders of a majority of the bonds," *the Northern Trust Company*, is expressly set up as one of the grounds for relief.

On the other hand, the allegations as to the American Trust and Savings Bank show it as taking *precisely the opposite side* of this matter in dispute, to that taken by the Farmers' Loan and Trust Company, viz: that *contrary* to the request of *the 610 bonds* and "*in compliance with*" the request of the 6,574 bonds (*the Northern Trust Company*), it "did, on the 28th of January, 1896 (the day following that on which the bill alleged that the Farmers' Loan and Trust Company *announced its intention to file a bill to foreclose*), *decline and refuse to join with*

said the Farmers' Loan and Trust Company *in any proceedings whatsoever* to enforce the provisions," etc., of the mortgage.

As we have already seen, the express allegations of the bill put the Northern Trust Company on the same side of the matter in dispute as the Lake Street Company.

And the equally express allegations as to the American Trust and Savings Bank show it ranging itself by its action on the same side of the matter as the Northern Trust Company, viz., by declining and refusing "*in compliance* with" the request of the Northern Trust Company "to join with" the Farmers' Loan and Trust Company "in any proceeding whatever to enforce the mortgage."

It is thus shown as in direct antagonism with the Farmers' Loan and Trust Company, in the very action complained of as "in violation of its duty" and as ground for its removal, etc.

It is true the bill alleges as further ground for relief, the alleged failure of the Farmers' Loan and Trust Company to make a deposit with the state auditor, and "the desire and wish of" the Northern Trust Company to have it removed as trustee for this reason also, and that there is no allegation as to the attitude of the American Trust and Savings Bank with reference to this.

But this was at most an *additional ground* alleged for the relief asked *against* the Farmers' Loan and Trust Company. It related solely to an alleged default of the Farmers' Loan and Trust Company alone, and had no relation to any joint duty of the two trustees, and called for no action whatever by the American Trust and Savings Bank.

This construction of the allegations of the bill as to the attitude of the American Trust and Savings Bank is conclusively confirmed by its own action in the suit as shown by the record (referred to hereafter) in continuously, and from the first, ranging itself on the side of the complainant, the Lake Street Company.

That such subsequent action can be properly considered, in determining on which side of the controversy the party should be ranged, see, *Pac. R. R. Co.* v. *Ketchum*, 101 U. S. 289, quoted *supra*, and *Illinois* v. *Ill. Cent. R. R. Co.*, 16 Fed. R. 881, and *Hutton* v. *Bancroft & Sons Co.*, 77 Fed. R., 481.

This subsequent action of the American Trust and Savings Bank in the course of the suit is also pertinent (1) as forcibly illustrating the grounds on which we have contended, *supra*, that no power was given to *one* of the trustees to represent the bond-holders in a suit for the removal of one of the trustees, and (2) as also forcibly illustrating the injustice, and in fact the absurdity, of holding that, on such allegations as the bill in this case makes the American Trust and Savings Bank should be ranged on the side of the plaintiff in error, and yet should continuously from the outset maintain the hostile attitude towards the plaintiff in error which this record discloses.

The record shows the following facts as to the actual attitude of the American Trust and Savings Bank with reference to "the matter in dispute:"

(1) While the bill made no allegations and sought no relief against the American Trust and Savings Bank, that company filed a detailed answer to all the allegations of the bill. (Pr. Rec., 39.) In its answer it makes no de-

nial of, but *expressly admits, all of the allegations of fact* in the bill, except one, which it does not deny but leaves the complainant to prove, and in so doing *expressly admits* a large number of material allegations, *expressly denied by the Farmers' Loan and Trust Company in its answer.* (Pr. Rec., 39–40.)

(2) On the hearing of the case, it offered no evidence whatever in opposition to the bill, but appeared by its counsel, Levy Mayer, as to whom the record of the proceedings recites, "Levy Mayer, Esq., *appearing for* the defendant, The American Trust and Savings Bank" (Pr. Rec., 101-2), *and directly acted and co-operated with the complainant throughout the hearing—*

1st. By proposing to the court to examine as counsel the attorney for complainant, when giving testimony *on behalf of the complainant.*

The evidence of complainant will be found on pp. 102 to 429 of the printed record.

Page 411 shows the following as occurring in the progress of the comp lainant's case:

"Mr. MAYER (counsel for the American Trust and Savings Bank, Pr. Rec., 102): I want to put a question to Mr. Knight, *counsel for the Lake Street Road.* Mr. Knight, as is evident to your Honor, *is conversant with some of the facts, and he is delicate about taking the witness stand.* * * * The facts are completely within his own knowledge *as to the business relations with Mr. Burry as agent for the Farmers' Loan and Trust Company.* * * *

The COURT: If they are facts that cannot be gotten from any other source, I think it might be the duty of the counsel to testify.

Mr. MAYER: *I understand that they cannot be obtained from any other source.*"

Thereupon Mr. Knight testified as a witness *for the*

complainant (Pr. Rec., 412), Mr. Judah, counsel *for the Northern Trust Company*, conducting the examination.

2nd. By offering and reading in evidence, *in the course of complainant's evidence*, a large number of letters which could only be material in the case as evidence in support of the complainant's bill (Pr. Rec., 421–429), particularly in view of the fact that the answer of the American Trust and Savings Bank, as we have seen, *made no issue of fact whatever* (Pr. Rec., 39), and which were expressly objected to by counsel for the Farmers' Loan and Trust Company, and insisted upon over that objection (Pr. Rec., 429).

The evidence for the complainant will be found on pages 102 to 429. On page 421, occurs the following in the progress of the complainant's case:

"Mr. MAYER: I have here *a package of letters*, written by the American Trust and Savings Bank, which I would like to refer to your Honor, addressed to Mr. Burry. (After reading from one of the letters.)

Now, there are a number of letters which have passed between the parties, none of which I have had time *to show the counsel.* They have just been handed to me, and I do not think it is necessary to read them. * * *

I have given the substance of perhaps forty or fifty letters, your Honor, which WE *will introduce without reading.*"

The letters referred to were then read in evidence and will be found on pages 422 to 429 of the record.

And on page 429, at the conclusion of the reading of the letters, occurs the following:

"Mr. KNIGHT (*counsel for the complainant*—after stating an admission as to the organization of the Farmers' Loan and Trust Company): *That is all, your Honor.*

Mr. BURRY (Counsel for the Farmers' Loan and Trust Company): We object to all these letters *offered by Mr. Mayer* on the ground that they are immaterial.

Mr. MAYER: The first mortgage which is released, as the evidence shows, was also to the Farmers' Loan and Trust Company, and this new mortgage made by the railroad company was a mortgage upon the same property and additional property with enlarged powers, and *these letters or some of them refer to that matter, and there are letters here in reference to the insurance; all of them* have to do with the *res gestæ* of this question.

The COURT: If the statement of counsel as stated is true I think they ought to be admitted."

3rd. By objections to evidence offered by its co-trustee, the Farmers' Loan and Trust Company (Pr. Rec., 574, 575, 549, 300). As an instance of this, certain evidence on behalf of the Farmers' Loan and Trust Company having been offered (Pr. Rec., 558–574), occurs the following:

"Mr. MAYER: What is the purpose of that, Mr. Burry?

Mr. BURRY: To show acquiesence in the suit (the foreclosure suit in the United States court) and proceeding with it without questioning the right of the trustee to bring it.

Mr. MAYER: I fail to understand *the remote pertinency of these documents now offered in evidence.* The present bill is *to remove the trustee*, first, because he has not complied with the law; secondly, *because he is abusing his powers.* Now, *what possible relation the demurrers filed in the Federal court can have on this hearing, I do not understand.*

The COURT: It may go in *subject to objection.*"

(For other instances, see Pr. Rec., 300; 362; 549; 575; 576).

(3) By filing a brief in the Supreme Court of Illinois in support of *an affirmance* of the decree removing the Farmers' Loan and Trust Company, etc., both on the question of jurisdiction and *on the merits.* (See 173 Ill. at p. 447.)

(4) By joining in this court in the motion of the Lake Street Company *to affirm the decree* against the

Farmers' Loan and Trust Company. (See Brief for Am. T. & S. Bank "on motion to dismiss or for affirmance," 66.)

In the face of these undisputed facts, we submit that it would be a travesty on justice to hold that the effect of the allegations of the bill to which we have referred was, to range the American Trust and Saving Bank on the same side of the controversy as the plaintiff in error, and thereby defeat the right of removal which it would otherwise have.

In *Pacific R. R. Co.* v. *Ketchum*, 101 U. S., 289, cited *supra*, a bondholder filed a bill to foreclose a mortgage to trustees, making the trustees defendants.

The case was removed to the United States court on petition of the mortgagor, defendant, and on appeal from the final decree of foreclosure it was objected that the case was not properly removed, for the reason that the defendant trustees *were citizens of the same state as the complainant.*

The other facts sufficiently appear from the opinion of the Court.

This court, in sustaining the jurisdiction, say:

"This leaves only to consider the position occupied by Vail and Fish (the trustees). When the suit was begun, as well as when the decree was rendered, they were trustees of the mortgage under which Ketchum and his co-complainants claimed. *No allegations were made against them. All that was said about them was that they doubted their right to proceed. There was no antagonism between them and Ketchum and his associates. He wanted them to proceed; they did not know that they had a legal right to do so.* * * * *It is needless to inquire what might have been the result if they had seen fit to dispute the right of the complainant bondholders to go on. They did not do so, but, on the contrary, before the decree was rendered,*

came in and substantially availed themselves of the suit which had been begun, so that IN THE END *the suit, in legal effect, became their suit. Although nominally defendants according to the pleadings,* THEY VOLUNTARILY, IN THE COURSE OF THE PROCEEDINGS, ARRANGED THEMSELVES ON THE SAME SIDE OF THE SUBJECT-MATTER OF THE ACTION WITH THE COMPLAINANTS. THIS THEY HAD THE LEGAL RIGHT TO DO. AFTER THAT, CLEARLY THE CONTROVERSY WAS BETWEEN CITIZENS OF ONE OR MORE STATES ON ONE SIDE AND CITIZENS OF OTHER STATES ON THE OTHER SIDE, and when the decree was rendered the only thing to be done was to foreclese the mortgage sued on, as between the trustees of the mortgage acting with their beneficiaries, and the railroad. *Of such a suit the Circuit Court had jurisdiction.*"

III.

THERE WAS IN FACT A SEPARABLE CONTROVERSY IN THE CASE WHICH COULD BE FULLY DETERMINED AS BETWEEN THE COMPLAINANT AND THE PLAINTIFF IN ERROR WITHOUT THE PRESENCE OF THE OTHER DEFENDANTS, THE AMERICAN TRUST AND SAVINGS BANK AND THE NORTHERN TRUST COMPANY.

We have thus far discussed the case on the theory of defendants in error, that the case presented but a single controversy—the controversy as to the removal of the plaintiff in error as trustee, etc.—and that the further relief prayed, the injunction against the prosecution of the foreclosure suit already brought, was only incidental and subsidiary to the main relief of the removal of the trustee.

We contend, however, and Judge GROSSCUP held (*Lake St. El. R. Co.* v. *Farmers L. & T. Co.*, 72 Fed., 804) that there are in fact two separable controversies—(1) the

controversy as to an injunction to enjoin plaintiff in error from bringing a suit to foreclose or prosecuting the suit it had already brought, and (2) the controversy as to the removal of plaintiff in error as trustee.

We believe that we have shown so conclusively that, —even on the theory of defendants in error that there is but one controversy—plaintiff in error was entitled to have the case removed, that we deem unnecessary a full discussion of our contention that there was in fact a separable controversy in the case, entitling plaintiff in error to remove, but will state shortly the grounds of this contention.

Under the provisions of the act of Congress of 1888, the existence in a suit of a separable controversy between citizens of different states gives any one or more of the defendants, interested in such controversy, the right to remove the case to the United States Circuit Court. The provisions of the act, giving such right of removal on the ground of separable controversy, are identical with the provisions on the same subject contained in the second section of the act of Congress of 1875, with the single exception that the act of 1888 limits the right of removal in such a case to one or more of *the defendants*, interested in such controversy, whereas the act of 1875 gave such right in such case to *plaintiffs* as well as to *defendants*.

In our statement, *supra*, we have set out at length the allegations of the bill, and we refer the court to that statement, as showing fully the nature of the suit, its objects and purposes, and its necessarily two-fold nature, owing to those objects and purposes and to the two-fold nature of the relief sought.

An examination of the allegations of the bill will show that the main ground of relief alleged was the threatened action by plaintiff in error of filing and prosecuting a bill for foreclosure of the mortgage.

The bill alleged that this threatened action by plaintiff in error was "in violation of its duty" as trustee and "for the purpose of injuring and destroying the property and assets of your orator" (Pr. Rec., 8), and it prayed the particular relief of a preliminary injunction against the bringing or prosecuting of any suit for foreclosure, etc., and that on the final hearing this injunction be made perpetual.

The allegations of the bill, on which the particular relief was sought, were detailed and constituted a large part of the bill, and the relief claimed under them—the injunction against filing or prosecuting a bill for foreclosure—was relief to which complainant would be entitled, if at all, wholly irrespective of whether complainant was removed as trustee, and was entirely consistent with its continuing to act as trustee. And the claim to this relief, on the allegations of alleged wrong doing "in violation of its duty," might well have been made the matter of a distinct and separate suit, and the controversy as to it was, therefore, separable from the controversy as to the removal of plaintiff in error as trustee.

We submit that the complainant set forth in its bill two distinct and separate cases—as distinct and separate as if each of them had been embodied in a separate bill —each of which cases, if established, called for and necessitated relief, peculiar and appropriate to itself, and distinct and different from the relief called for and necessitated by the other.

This view was taken by Judge GROSSCUP, in his decision on the motion to remand, and was fully stated by him in his opinion as one of the grounds of his decision.

It is there shown by Judge GROSSCUP that the case presents "this separate controversy, namely, the case of one of two trustees under a mortgage who, in violation of the terms of the mortgage, and to the irreparable injury of the mortgagor, intends to initiate proceedings for a foreclosure, on account of which and against whom an injunction is asked." And Judge GROSSCUP then proceeded to show that to this separate controversy neither the American Bank nor the Northern Trust Company were necessary parties, and also, that, in any view, they must be ranged with the complainant. (*Lake Street Elevated R. Co.* v. *Farmers' Loan & Trust Co.*, 72 Fed. Rep., 804.)

In this view, that the controversy over complainant's alleged right to the injunction is separable from the other controversy as to the removal of the trustee—under the allegations of the bill—both the Northern Trust Company and the American Bank, even if necessary parties to the former of these two controversies, would clearly be ranged on the same side as complainant, and the case was therefore removable.

Another view which may be taken of the case is, that the principal controversy in the case, on consideration of the whole bill, is as to the right of the Farmers' Loan and Trust Company to set in motion foreclosure proceedings. This view is also forcibly put in Judge GROSSCUP'S opinion, as one of the grounds of his decision, and we need not add to what is there said. (See 72 Fed. R., 804.)

IV.

THE BILL WAS BROUGHT FOR THE PURPOSE OF ENJOINING, BY AN INJUNCTION ISSUED OUT OF THE STATE COURT, THE FURTHER PROSECUTION IN A COURT OF THE UNITED STATES OF A SUIT PREVIOUSLY BROUGHT IN THAT COURT BY THE PLAINTIFF IN ERROR, UNDER THE AUTHORITY OF THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND THEREFORE INVOLVED A FEDERAL QUESTION, ENTITLING THE PLAINTIFF IN ERROR TO REMOVE THE CASE TO THE UNITED STATES CIRCUIT COURT.

The bill alleged that plaintiff in error, "in violation of its duty," "intends to and will, unless restrained by this honorable court, proceed to take possession of, or *attempt to foreclose* said mortgage trust deed." (Pr. Rec., 8.)

The bill prayed (Pr. Rec., 9) "that an injunction *pendente lite* may be issued restraining and enjoining" the plaintiff in error from "taking any proceedings, or bringing *or prosecuting any suit or suits*, or acting in any manner whatsoever, under and by virtue of the terms and conditions of said mortgage or deed of trust, *and that, upon the final hearing hereof, said injunction may be made perpetual*," and an *ex parte* preliminary injunction was issued in accordance with the prayer of the bill.

This injunction, by its express terms, prohibited plaintiff in error from further *prosecuting* the suit to foreclose, which it had, prior to the filing of the bill in the state court, begun in the United States court, and in which *subpœnas* to answer had already been issued, though not served.

That in alleging that plaintiff in error "will *proceed to*

attempt to foreclose said mortgage deed of trust," "unless restrained by this honorable court," and in praying that plaintiff in error be enjoined "from prosecuting *any* suit or suits," and that, "upon the final hearing hereof, said injunction may be made perpetual," the complainant intended to reach and enjoin the suit to foreclose, already brought by plaintiff in error *in the United States Court*, is clear, not only from the language itself, but from the action, both of the com plainant and the trial court, based on those allegations.

At the hearing, the complainant made no pretense that there was any othe r suit by plaintiff in error pending in any court, except the foreclosure suit in the United States Circuit Court, but proceeded to prove, *under the allegations of its bill, quoted supra, and as a part of its original case*, the pendency of that suit, putting in evidence the original and amended foreclosure bills (Pr. Rec., 254–260, 261–291), the summons to the defendants therein, the Lake Street Company, the American Trust and Savings Bank *et al.* (Pr. Rec., 299), and the marshal's return of service on the Lake Street Company.

Complainant's solicitors also examined Mr. Louderback as to the time when the summons in the foreclosure suit was served on him (Pr. Rec., 300).

And in the course of the hearing, complainant's solicitors repeatedly stated that they claimed that the injunction covered the prosecution of the foreclosure suit in the United States court. (Pr. Rec., 574, 566, 577, per Mr. Knight.)

And by the final decree entered by the trial court, the bill was construed by that court as covering, by its allega-

tions and prayer, the foreclosure suit previously brought and pending in the United States court.

(1) By findings of fact (Pr Rec., 95–97) that the bill to foreclose in the United States court was filed, and the summons *issued*, prior to the filing of the bill in this case, but that service of the injunction in this case was prior to the *service* of the summons in the foreclosure case, and that plaintiff in error *acted improperly* in filing the foreclosure bill.

(2) By decreeing (Pr. Rec., 98–99) that plaintiff in error, and its attorneys, etc., "be and they are hereby" "*perpetually* enjoined and restrained from" "bringing *or prosecuting* ANY suit or suits to foreclose said mortgage or trust deed."

The petition for removal set out the filing of the foreclosure bill in the United States Court, alleging that it was filed prior to the commencement of the case at bar, and that the bringing of the suit at bar "tends to obstruct and impede the administration and jurisdiction" of the United States Circuit Court in the foreclosure suit, and "interferes with the property thereby brought into said Circuit Court," and that there is involved "in this suit a controversy arising under and by virtue of the laws of the United States, which controversy affects the jurisdiction of said Circuit Court of the United States in said cause, so commenced therein by your petitioner."

On this record, we insist that the case before the court was properly removed, as one arising under the Constitution and laws of the United States.

The right to prosecute suits, already commenced in the Federal courts, is a right conferred by the Constitution

and laws of the United States, and a suit, which seeks an injunction against persons to prevent their exercise of that right, seeks to deprive them of a right secured by the Constitution and laws of the United States, and is unquestionably a suit "arising under the Constitution and laws of the United States."

There can be no doubt that this suit, seeking to enjoin a suit already begun in the United States Circuit Court, could have been originally commenced in that court by the complainant, without regard to the citizenship of the parties. (*Clarke* v. *Matthewson*, 12 Peters, 164; *Bock* v. *Perkins*, 139 U. S., 628; *Sims* v. *Guthrie*, 9 Cranch, 25; *Krippendorf* v. *Hyde*, 110 U. S., 276; *Jones* v. *Andrews*, 10 Wall., 327; *Freeman* v. *Howe*, 24 How., 450; see, also, *Wood* v. *Drake*, 70 Fed. Rep., 881, *infra*, and cases there cited; *S. L. K. of P.* v. *Wilson*, 66 Fed. Rep., 785, *infra; Dunlop* v. *Stetson*, 4 Mason, 349; *Logan* v. *Patrick*, 5 Cranch, 288.) And if so, the suit was removable by the express terms of the Act of 1888, viz: that any suit "of which the Circuit Courts are given original jurisdiction" under the Act, may be removed. (See *Tennessee* v. *Bank*, 152 U. S., *infra*.)

In passing on the point of the right to remove, on the ground of a Federal question, the courts will not examine into the merits of that question *further than to see that such question exists;* if such question exists, the right to remove also exists, and the Federal court has jurisdiction.

The *merits* of the Federal question will afterwards be examined into by the Federal court in the exercise of that jurisdiction, which it has acquired by the existence of that question. (*Furman* v. *Nichol*, 8 Wall., 44; *Green* v. *Van Buskirk*, 5 Wall., 307; *Kessinger* v. *Hink-*

house, 27 Fed. Rep., 883; *Mahin* v. *Pfeiffer*, 27 Fed. Rep., 892; *Hatch* v. *Bridge Co.*, 7 Sawyer, 127.)

In many cases the Federal courts have sustained their jurisdiction on the ground that there was a Federal question, although they have finally decided that question against the Federal right. (See, for example, *Buck* v. *Colbath*, 3 Wall., 320; *McGuire* v. *Commonwealth*, 3 Wall, 395; *Walte* v. *Dowley*, 94 U. S., 527; *Cohen* v. *Virginia*, 6 Wheat., 264; *Weil* v. *Calhoun*, 25 Fed. Rep., 865; *S. G. L. Co.* v. *Saginaw*, 28 Fed. Rep., 529.)

1. It is, however, contended in the brief for the American Bank, filed on the motion to dismiss, that the bill in this case did not state *specifically* that the complainant was seeking an injunction against the prosecution of a foreclosure suit in the *United States Court*, and that the rules laid down in *Tennessee* v. *Bank*, 152 U. S., 454, and the other cases cited by counsel, apply, and the case was not removable.

In answer to this, we say:

In *Tennessee* v. *Bank*, 152 U. S., 454, *supra*, and the other cases cited, what this court held was, merely, that the fact that *a defendant might* set up *a possible defense*, based upon the Constitution or laws of the United States, did not make the suit one arising under that Constitution or those laws.

Three cases were before this court for decision, in *Tennessee* v. *Bank*, *supra*, all of them suits by the State of Tennessee to recover taxes.

As to two of these suits, this court merely held that *a suggestion of the plaintiff* that the defendant *might* set up a claim under the United States Constitution or laws,

did not make the suit one arising under that Constitution or those laws. (See per Mr. Justice GRAY, at p. 464 of 152 U. S.)

And in the third case then before this court, the plaintiffs' bill made no reference whatever to the Constitution or laws of the United States, and did not even suggest that the defendants might set up a claim under them.

It is submitted that the doctrine of the cases just referred to has no application to the case at bar for several reasons.

(1.) As already stated, *supra*, the bill alleged that plaintiff in error intended to and would, "unless restrained by this honorable court," "*attempt to foreclose* said mortgage," and the prayer of the bill expressly asked an injunction against "*prosecuting* ANY suit or suits." (Pr. Rec., 9.)

This plain and sweeping language, "*any* suit or suits," clearly included *all* pending suits, *in whatever court they were pending, whether in a state court or in a court of the United States.*

The language embraced any suit in the United States Court as expressly and clearly as if the pleader had added to it the phrase, "either in a state court or a court of the United States" (or some equivalent phrase), and the clause had read, "prosecuting any suit or suit, in a state court or a court of the United States."

It necessarily follows that the complainant's bill expressly and clearly shows on its face that the complainant was seeking an injunction against the prosecution of any suit *in the United States courts*, as well as in the state courts.

And if so, the case was removable, on the ground that

it involved a Federal question, disclosed on the face of the complainant's bill, and as the record shows, *necessarily involved in the complainant's own case, and the proof essential to its support*, and no argument against its removability on that ground can be drawn from the doctrine laid down in *Tennessee* v. *Bank*, 152 U. S., *supra*, that the *possibility that a defendant may set up a defense*, based on the Constitution or laws of the United States, does not make the case one arising under that constitution or those laws.

(2.) But *further:* As we have already stated, *supra*, the bill by its express terms "*prosecuting any* suit" etc., necessarily included the suit for foreclosure, then pending in the United States Circuit Court, and was clearly intended by the complainant to cover that suit.

And as that suit for foreclosure was then pending in the United States Circuit Court, and that court takes judicial notice of its own records, and of what suits are pending before it, it had judicial knowledge that the bill in this case sought to enjoin a suit in that court.

And we insist that, as it appeared from the complainant's bill, in connection with matters of which the United States Circuit Court had judicial notice, that the complainant was seeking to enjoin a suit in that court, a Federal question was, in any view, presented by the complainant's bill, and a cause for removal was shown.

Our position on this point is directly supported by the decision of the Circuit Court in *Pitkin* v. *Cowen*, 91 Fed. R., 599.

In that case, the action was brought in a state court, against the receivers of a railroad company. The plaintiff's petition did not disclose by *what court* the receivers

were appointed. The receivers filed a petition to remove, setting up that they had been appointed *by the United States Court*, and that the case, therefore, involved a Federal question.

A motion to remand was made, on the ground that the plaintiff's petition did not disclose a Federal question.

In overruling this motion, the Circuit Court held that it would "take judicial notice of the fact that the receivers were appointed" by the United States court, and that, although the plaintiff's pleadings failed to aver by what court the receivers had been appointed, nevertheless, as it appeared from those pleadings, "in connection with matters of which the court will take judicial notice, that the receivers were appointed" by the United States court, "a Federal question is sufficiently shown in the original petition (of the plaintiff) to furnish a basis for removal."

(3) But still *further:* As we have already seen, *supra*, the express terms of the complainant's bill and the broad prayer for an injunction against "*prosecuting any* suit or suits" necessarily had reference to, and could only have reference to, the suit for foreclosure then pending in the United States Circuit Court, and the unquestionable purpose and object of this bill was to enjoin that suit.

Such, then, being the express terms of the complainant's bill and prayer for an injunction, and the unquestionable purpose and object of the bill, it was necessary for the complainant, *as a part of its own case*, to show as, it in fact did on the hearing, the *pendency of the foreclosure suit in the United States court*, and if granted the perpetual injunction prayed for (as it in fact was), such perpetual injunction would (and, as we have seen,

supra, in fact did) by its terms embrace the foreclosure suit.

And, on such a record, we insist that the case was removable on the ground of a Federal question, and that the rule laid down in *Tennessee* v. *Bank*, *supra*, has no application.

If, in such a case, it can be properly said that the bill does not show the existence of the Federal question (which we deny), because it merely fails to specify explicitly that the suit, whose further prosecution is sought to be enjoined, is pending in the United States court, we nevertheless insist that, in such a case, the petition for removal can be considered, in order to ascertain *in what court* such suit is pending.

Here the petition for removal (Pr. Rec., 32), quoted *supra*, showed that the case necessarily involved a Federal question. It averred the filing of the foreclosure bill in the United States court, prior to the commencement of this suit, and that the bringing of this suit tended to obstruct the jurisdiction of the Circuit Court in the foreclosure suit, and that there was, therefore, a controversy in this suit, arising under the laws of the United States.

To hold, in such a case, that the suit is not removable, because the complainant's bill does not *specifically name* the court, in which the suit really sought to be enjoined is pending, would be to hold that, where a *complainant's own case* really and *necessarily* involves a Federal question, and this would appear *if the complainant was explicit in the allegations of his bill*, the complainant can deprive a defendant of his constitutional and statutory right to remove the case, *by the mere device of omitting to state his case definitely and explicitly in his bill.*

And the effect of this would be, that, notwithstanding the fact that the general statement, so used as a mere device, was broad enough to cover the facts on which the Federal question, arises, the complainant, after the time for removal had passed by, might confine his evidence at the hearing to proof of the facts which involved the Federal question, in controversy, and obtain a decree in his favor, which directly passed on and disposed of that Federal question.

We submit that, by the decision in *Tennessee* v. *Bank*, 152 U. S., and similar cases, this court never intended to permit the use of any such device by a complainant, or to sanction the depriving of a defendant of his constitutional right of removal by any such ingenious trick on the part of a complainant, in framing his bill.

Our position on this point is directly supported by the decision of this court in the analogous case of *Texas & Pac. Ry. Co.* v. *Cody*, 166 U. S., 606, and also by the decision of the Court of Appeals for the Fifth Circuit in *Supreme Lodge* v. *Wilson*, 66 Fed. R., 785.

In *Texas & Pac Ry. Co.* v. *Cody*, 166 U. S., 606, *supra*, the plaintiff's petition, filed in a state court in Texas, alleged that plaintiff was a resident of Texas, and the defendant company a corporation *of the State of Texas.* The company was, in fact, a corporation organized under certain acts of Congress, and it filed a petition, under the Act of 1888, to remove the case to the United States court, *on the ground that it involved a Federal question*, alleging that *the defendant company was organized under the acts of Congress.*

On writ of error to the United States Circuit Court of Appeals, this court held that the case was properly removed, as one involving a Federal question.

This court, after stating the rule laid down in *Tennessee* v. *Bank*, 152 U. S., *supra*, and similar cases, said:

"If recovery *directly depends upon a right claimed* under the Constitution, laws or treaties, plaintiff's statement of his case *must necessarily disclose the fact*, and if the action is brought in the state court, defendant can remove it. If, however, plaintiff asserts no such right, and defendant puts his defense on the possession of such right, or its denial to plaintiff, though essential to his recovery, then defendant is remitted to his writ of error from this court to the state court to test the Federal questions thus raised.

It is obvious that, in the instance of diverse citizenship, a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds, but *he cannot cut off defendant's constitutional right*, as a citizen of a different state than the plaintiff, to choose a Federal forum, *by omitting to aver, or mistakenly, or falsely, stating the citizenship of the parties.*

And this must also be so as to Federal railroad corporations. It was held in the Pacific Railroad Removal cases that, as all the faculties and capacities possessed by such corporations were derived from their acts of incorporation by Congress, all their doings arose out of those laws, and therefore, SUITS BY AND AGAINST THEM WERE 'SUITS ARISING UNDER THE LAWS OF THE UNITED STATES.' CONCEDING THIS, THE PRINCIPLE APPLICABLE TO DIVERSE CITIZENSHIP MAY REASONABLY BE APPLIED TO THEM.

If, in this case, plaintiff had simply described defendant by its name, without more, there would seem to be no question that, as the corporation was judicially known to be a Federal corporation, defendant would be entitled to remove the case on proper allegations in its petition; AND WE THINK THIS NECESSARILY FOLLOWS WHERE, BY SOME MISTAKE, OR OTHERWISE, THE DEFENDANT IS ERRONEOUSLY STATED TO BE CREATED UNDER STATE LAWS."

And this court then proceeded to distinguish the case of *Oregon Short Line, etc., Railway* v. *Skottowe*, 162 U. S., 490, on which defendants in error rely in the case at

bar, on grounds which equally distinguish it from the present case. (See 166 U. S., at 610.)

The same doctrine was applied by the Circuit Court of Appeals in *Supreme Lodge* v. *Wilson*, 66 Fed. R., 785, *supra*.

In that case, the plaintiff's declaration, filed in the state court, failed to aver under what laws the defendant company was incorporated. The company filed a petition to remove, alleging that it was a corporation organized under the acts of Congress, and therefore entitled to remove, and the Circuit Court of Appeals held that the case was removable.

We call particular attention to the forcible reasoning of the court at p. 786.

2. It is also contended by counsel for the American Bank (Brief, 37-43) that, even if the bill had *explicitly* and specifically alleged that the foreclosure suit sought to be enjoined was pending *in the United States court*, it would not show that the case involved a Federal question, for the reason that the injunction was prayed *against the parties*, and not *against the United States court itself*.

As the right of *parties* to commence suits in the Federal courts is a right conferred by the Constitution and laws of the United States, it is too clear for discussion that a bill, *which seeks to enjoin the exercise of that right*, so conferred, involves a Federal question, just as much as if the bill sought to enjoin the United States court itself. (See, also, *Bank* v. *Stevens*, 169 U. S., 432, 459-463.)

3. It is also contended that, even if the foreclosure suit in the United States court had been specifically referred to in the bill, the only question involved would be, which court—the state court or the Federal court—first ac-

quired jurisdiction (Br., 40, 43), and counsel argue that the record shows that the state court first acquired jurisdiction on the ground that the summons was first *served* in the state court case (Br., 41-42), and, that, in any view, the question as to which court first acquired jurisdiction is not a Federal question. (Br., 43.)

This record shows that the foreclosure bill was filed in the United States court and summons issued on it, *before* this bill was filed in the state court, on January 30, 1896.

The right of plaintiff in error *to cause the summons to be served*, which it had already procured to be issued on the filing of the foreclosure bill, was involved in its right to bring the suit in the United States court,—a right conferred on plaintiff in error by the Constitution and laws of the United States.

The injunction sought by the bill (and actually issued on January 30) was against "*prosecuting*" the Federal court suit. By using this language, "prosecuting," it enjoined plaintiff in error *from causing the summons*, which it had previously procured the issue of, *to be served*, and, therefore, unquestionably enjoined the exercise of a right, conferred on plaintiff in error by the Constitution and laws of the United States. And, accordingly, the bill plainly involved a Federal question.

On January 31, plaintiff in error filed its petition for removal, setting up the existence of this Federal question as one of the grounds for a removal. And the removability of the case must be determined on the state of the record *at the time of the filing of the petition for removal.*

Such being our position on this point, the contentions of counsel now under consideration have, we submit, no bearing on the question of the removability of the case on the ground of Federal question, but they will be covered by our discussion under Point VI, *infra.*

We will, however, add, in this connection, that the contentions of counsel are based on what took place *after* the petition for removal had been filed, and they are attempting to argue that the petition should have been denied because, subsequently, service of summons was first had in the state court case, and (as they claim) that fact gave the state court *prior* jurisdiction.

In other words, the contention is, that the complainant could give the state court prior jurisdiction by obtaining an *ex parte* injunction (before service of any summons) against prosecuting a suit previously brought in the United States Court, in which summons had been issued but not served, thereby enjoining the service of that summons, and then proceeding to serve the state court summons on plaintiff in error, before it could have the injunction dissolved and proceed to serve the summons in the United States Court suit.

4. It is also contended (Br., 43-46) by counsel for the American Trust and Savings Bank, that the petition for removal was insufficient for the reason that it was not made by all of the defendants in the case.

Section 2 of the Act of 1888, provides that any suit involving a Federal question "may be removed *by the defendant or defendants therein.*"

That one of several defendants may remove a case, on the ground of its involving a Federal question, was held by this court, in *Mitchell* v. *Smale*, 140 U. S., 406, a point there directly involved and decided.

And the same ruling has been made by the Circuit Courts in *S. P. R. R. Co.* v. *Townsend*, 62 Fed. R., 161, and *Landers* v. *Felton*, 73 Fed. R., 311. (See, also, Black's Dillon on Removal, sec. 77, note (98), p. 114.

But *further;* we have already shown, *supra*, in discussing the right to remove on the ground of diversity of citizenship, that neither the American Trust and Savings Bank nor the Northern Trust Company is an indispensable or even a necessary party to the suit, and also that if either of them was such a party, it must be ranged on the side of the complainant.

This being so, it cannot be held that Section 2 of the Act of 1888 requires either one of them to join in the petition before the plaintiff in error could remove the case on the ground that it involved a Federal question.

V.

THE DECISION OF THE UNITED STATES CIRCUIT COURT ON THE MOTIONS TO REMAND WAS AN ADJUDICATION OF THE FEDERAL QUESTION AS TO WHETHER THE CAUSE WAS REMOVED TO THE UNITED STATES COURT, MADE ON THE MOTIONS OF DEFENDANTS IN ERROR SUBMITTING THE QUESTION TO THAT COURT FOR ITS DECISION, AND THE STATE COURT ERRED IN PROCEEDING FURTHER IN THE CASE AFTER THAT ADJUDICATION HAD BEEN BROUGHT TO ITS NOTICE BY PROPER PLEADINGS AND PROOFS.

It appears from the record that, at the time of its appearance in this case in the state court (which was expressly limited to that purpose), the plaintiff in error filed a petition and bond for removal. (Pr. Rec., 31–34.) The trial judge in the state court thereupon entered an order denying the removal. (Pr. Rec., 36.) Plaintiff in error then presented a transcript of the record to the United States Circuit Court, and that court entered an order, granting leave to file the transcript and docket the case. (Pr. Rec., 532.)

Thereupon the Lake Street Company entered its appearance in the United States Court, and made a motion to remand the case. (Pr. Rec., 538.) And like motions were made by the other defendants in error. (Pr. Rec., 533–535.)

These motions were argued before Judge GROSSCUP, and on March 16, 1896, he filed a full opinion, holding that the United States Court had jurisdiction, and denying the motions to remand, and entered an order accordingly. (For Judge GROSSCUP's opinion, see *Lake Street El. R. R. Co.* v. *Farmers' Loan & Trust Co.*, 72 Fed. R., 804; for the order denying the motions to remand, see Pr. Rec., 545.)

The United States Court, having thus decided that it had jurisdiction of the case by its order overruling the motion to remand, also entered an order modifying the *ex parte* injunction issued by the state court, so as to allow the plaintiff in error to file an amended bill in the foreclosure suit, which it had brought in that court. (Pr. Rec., 545.) It also set for hearing the motion to dissolve the injunction issued by the state court, (Pr. Rec., 545-546), and subsequently entered an order dissolving the injunction. (Pr. Rec., 548.) Thereupon the complainant, the Lake Street Company, appealed from this order dissolving the injunction, to the Circuit Court of Appeals (Pr. Rec., 548), where the appeal was decided adversely to it. (77 Fed. R., 769.)

Notwithstanding this action of the United States court in making these different orders, the complainant, the Lake Street Company, on March 18, 1896 (the second day after the entry of the order denying the motions to remand), returned to the state court, and there made a motion *to attach the attorney for plaintiff in error for*

contempt in filing the amended bill of foreclosure in the United States court, in pursuance of the order of that court modifying the injunction, and obtained an order *striking from the files* the special appearance filed by plaintiff in error, as "improperly and improvidently filed," and ruling plaintiff in error to answer on *March 25, 1896* (*one week* from the date of the rule).

Plaintiff in error thereupon filed an answer, and subsequently filed an amended answer in the state court. (Pr. Rec., 50-70.)

This amended answer, after setting up the proceedings in the United States Court, averred (Pr. Rec., 53-54):

"And defendant insists that, by reason of the premises, the question of the jurisdiction of said United States court over this cause became adjudicated, and all the parties hereto are bound by said order of said United States Court, denying said motion to remand and retaining jurisdiction of this cause, and further, that, by reason of the premises, said complainant is estopped from now insisting that this cause has not been removed to said United States Circuit Court."

After the filing of this amended answer, the case was set for a hearing in the state court.

On the hearing, plaintiff in error read in evidence (Pr. Rec., 531-546,) a certified copy of the different proceedings in this case in the United States Circuit Court.

On these facts, we contend:

That the decision of the United States Circuit Court on the motions to remand, was an adjudication of the Federal question as to whether the cause was removed to the United States court, made on the motions of defendants in error, submitting the question to that court for its decision; and that the state court erred in proceeding further in the case after that adjudication had been brought to its notice by proper pleadings and proofs.

There is a clear distinction between the legal effect of the action *of the state court in refusing an order for removal*, and that of the order *of the Federal court, made on a motion to remand, entered in that court, after the cause had been docketed there, overruling the motion and refusing to remand.*

It is settled by repeated decisions of this court, that the action of the state court, refusing an order of removal, is not an *adjudication* of the question of *jurisdiction* between the parties, and that, therefore, notwithstanding such order, the case may be docketed and the record filed in the Federal court, and that court may proceed and take jurisdiction of the case.

Kern v. *Huidekoper*, 103 U. S., 485, 490.
Marshall v. *Holmes*, 140 U. S., 589–595.

In *Marshall* v. *Holmes*, 141 U. S., 589–595, *supra*, this court say:

"If, under the Act of Congress, the cause is removable, then, upon the filing of the petition and bond, it was in law removed so as to be docketed in that court, *notwithstanding the order of the state court refusing to recognize the right of removal.*"

But when a transcript of the record is filed, and the case docketed in the Federal court, and the party opposing the removal appears in that court, and files his motion to remand, and *thereby invokes the judgment of that court on the question of jurisdiction*, a very different question is presented, and a different effect is given to the order *of the Federal court* made on the motion.

The following cases, decided by this court, establish that where, after the transcript has been filed in the Circuit Court of the United States, the adverse party there appears and makes a motion to remand, and an order is

made on that motion, either remanding or refusing to remand, the order is *a direct adjudication of the question of jurisdiction between the parties by the Federal court, in the exercise of a jurisdiction which the law recognizes as exclusive in the Federal courts.*

Railroad Co. v. *Koontz*, 104 U. S., 5, at 15.

Ex parte Ford, 105 U. S., 578.

Turner v. *Farmers' Loan & Trust Co.*, 106 U. S., 552.

Edgerton v. *Jefferson*, 111 U. S., 770, at 773.

Des Moines Navigation Co. v. *Iowa Homestead Co.*, 123 U. S., 552, at 559.

Dowling v. *Applegate*, 152 U. S., 327, at 340.

If, on the motion to remand, the decision of the Federal court is that it has no jurisdiction, and an order is accordingly entered remanding the case to the state court, this order of remand, which was formerly appealable directly to this court, is, under the Act of 1888, a final adjudication of the question in both the state and Federal courts, for the reason that this right of appeal from the order to this court has been taken away.

Missouri Pacific Ry. Co. v. *Fitzgerald*, 160 U. S., 556.

On the other hand, if the decision on the motion is, that the Federal court has jurisdiction, and an order is accordingly entered overruling the motion to remand, the remedy of the party making the motion is to preserve the point on the record, and assign the ruling for error in this court on appeal from the final decree.

Edgerton v. *Jefferson*, 111 U. S., 770.
Ex parte Ford, 105 U. S., 578.
R. R. Co. v. *Koontz*, 104 U. S., at 15.

Until such review, the order is necessarily a conclusive adjudication between the parties of the question of jurisdiction.

Hence, in *Missouri Pacific Ry.* v. *Fitzgerald*, 160 U. S., at 582, where an order was made in the Federal court, remanding the case to the state court, this court, in passing on the effect of the order, say:

"The Supreme Court of Nebraska rightly recognized *the courts of the United States to be the exclusive judges of their own jurisdiction, and declined to review the order of the Circuit Court.*"

And in *Railroad Co.* v. *Koontz*, 104 U. S., 5, at 15, this court say:

"The right to remove is derived from a law of the United States, *and whether a case is made for removal is a Federal question.* * * * When the suit is docketed in the Circuit Court, the adverse party may move to remand. *If his motion is decided against him, he may save his point on the record*, and after final judgment, bring the case here for review, if the amount involved is sufficient to give jurisdiction. *If, in such case, we think his motion should have been granted, we reverse the judgment of the Circuit Court, and direct that the suit be sent back to the State court, to be proceeded with there as if no removal had been had.*"

In *Ex parte Ford*, 105 U. S., 578, a motion to remand was made, and an order entered denying the motion. Application was then made to this court for a mandamus, directing the Circuit Court to remand the case on the ground that the petition did not give jurisdiction.

This court, in denying the application, said:

"*Jurisdiction has been given to the Circuit Court to*

determine whether the cause is one that ought to be remanded. The Act of 1875 has given an appeal or writ of error to this court for the review of orders to remand, without regard to the amount involved. (*Babbitt* v. *Clark*, 103 *id.*, 606.

The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. *If no power of review is given, the judgment of the court,* HAVING JURISDICTION TO DECIDE, *is final.*"

In *Dowell* v. *Applegate*, 152 U. S., 327—in which the case, having been removed to the United States Court, went to a decree in that court—this court, in holding that the adjudication that the petition for a removal gave jurisdiction was conclusive, when attacked collaterally, said that the question of jurisdiction "was a question which the Circuit Court of the United States *was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction.*

Even if that court erred in entertaining jurisdiction, ITS DETERMINATION OF THAT MATTER WAS CONCLUSIVE UPON THE PARTIES BEFORE IT, AND COULD NOT BE QUESTIONED BY THEM OR EITHER OF THEM COLLATERALLY, OR OTHERWISE THAN ON WRIT OF ERROR OR APPEAL TO THIS COURT."

Our position on this point is directly supported by the decision of this court in *Turner* v. *Farmers' Loan & Trust Company*, 106 U. S., 552, affirming *Turner* v. *I. B. & W. Ry. Co.*, 8 Biss., 380.

In that case, the appeal was from an order of the United States Circuit Court, confirming a report of sale, under a decree foreclosing a mortgage. The appellant contended that the order appealed from was erroneous, and should be reversed *on the ground that the United States Circuit Court had no jurisdiction of the case.*

It appeared hat, after the case was docketed in the

Federal court, *the defendant made a motion to remand, which was denied.* This court, in overruling the contention that the Circuit Court did not have jurisdiction of the case, said:

"We are of opinion that the question of jurisdiction now raised cannot be determined upon an appeal merely from the order confirming the report of sale. *Whether the suit was one which the Farmers' Loan and Trust Company was entitled to have removed, that is, whether the Circuit Court of the United States could rightfully proceed, after the petition for removal, accompanied by a sufficient bond, had been filed in the state court,* WAS A QUESTION DIRECTLY PRESENTED TO THE COURT FOR JUDICIAL DETERMINATION UPON THE MOTION THAT THE CAUSE BE REMANDED. THE DENIAL OF THAT MOTION CONSTITUTED AN ADJUDICATION BY THE FEDERAL COURT THAT THE FACTS EXISTED WHICH WERE NECESSARY TO GIVE JURISDICTION."

In the case now before this court, by their appearance in the Federal court after the filing of the record and the docketing of the cause there, and their motions to remand the case to the state court, the defendants in error submitted to the Federal court the question of jurisdiction for its decision. It was a question which, under the authorities cited, that court had jurisdiction to hear and determine, and its order overruling the motions to remand was an adjudication of the question between the parties by a court having jurisdiction to decide it.

If the decision sustaining the jurisdiction had been embodied in a final decree, it is clear it would have been a binding adjudication on the question of jurisdiction as well as all other questions, and could have been pleaded and given in evidence as such.

The decisions are numerous that while, as expressly held by this court in *Kern* v. *Huidekoper*, 103 U. S., 485,

at 493, and *Dietzsch* v. *Huidekoper*, 103 U. S., 494, at 496, no such effect can be given to the decision of the *state* court on this question of Federal jurisdiction, the correctness of the ruling embodied in such decree by the *Federal* court cannot be questioned collaterally. (See cases cited, *supra.*)

The only difference between the case supposed and that actually presented in this case, is in the fact that the order which was pleaded and given in evidence was not a *final* decree—which could only be set aside by the court that entered it at the term at which it was entered—but an interlocutory order, subject to be set aside by the court that entered it, as well after the term at which it was entered as during that term.

It was, however, *an express adjudication by the Federal court, on the complainant's own motion, of the precise question of jurisdiction.* If the decision had been against the Federal jurisdiction, it would have been conclusive and final as to all the parties. In such cases, it has been expressly held that such an order is conclusive, not only on the Federal court but on the state court, and that on its presentation to the state court, that court would be bound to proceed with the case, notwithstanding its previous express order, granting the petition of removal, and adjudging that it had no further jurisdiction of the case.

On what just ground, then, can it be held that, because the decision on the precise question, and invoked in the same way by the complainant's own motion to remand, is the other way—that is, that the Federal court has acquired jurisdiction, and therefore the motion should be overruled—that decision, when properly pleaded and given in evidence in the state court, should be of no effect in that court?

The only legal effect of the fact that the order overruling the motion to remand was interlocutory was, that the order, which, until set aside, would stand as an adjudication of the Federal question, could be set aside by the court that made it at any subsequent term, as well as at the term at which it was entered, while a final decree could only be set aside at the term.

The only effect of setting aside such order at a subsequent term would be that the United States Court would then remand the case to the state court, just as it would if the same decision was embodied in a final decree, and this decree should be subsequently set aside, either by the court that entered it during the term it was ordered, or by the court on appeal after the term at which it was entered. And, in such case, the remanding order would be conclusive on the state court.

We submit that the state court, instead of proceeding to a decree, should have entered the order directed by this court to be entered by the state court in the *Koontz* case (104 U. S., 5), that the court proceed no further, unless its jurisdiction should be restored by the action of the Circuit Court of the United States, or by this court.

Any other view would involve manifest inconsistencies, and would enable parties, after experimenting on the decision of the Federal court, to return to the state court and there proceed with the case, notwithstanding the adjudication of the Federal court that it had acquired jurisdiction, made on their own motion, and thereby bring about conflicts in jurisdiction, which, under the law, as settled by the decisions we have cited, could not have been intended. These possible consequences are forcibly illustrated by the action of the Lake Street Company in

this case in returning to the state court, *after its appearance and motion to remand in the Federal court and the decision of that court overruling the motion and holding that it had jurisdiction of the case*, and there moving to attach counsel for plaintiff in error for contempt of the state court, and forcing the case to a hearing in that court, *notwithstanding the previous proceedings and order in the Federal court made on its motion.*

Our position on this point is directly sustained by the decision of the Supreme Court of Wisconsin in the cases of *Northern Pac. R. Co.* v. *McMullen* and *Same* v. *Seipp*, 86 Wis., 501, and also by the decisions, quoted *infra*, of the Supreme Courts of Iowa, Michigan, Kansas and Nebraska in *Ryan* v. *Mathews*, 64 Iowa, 250; *Le Roux* v. *Bay, Circuit Judge*, 46 Mich., 189; *Bodley* v. *National Bank*, 38 Kansas, 59, and *Gerner* v. *Mosher*, 78 N. W. Rep., 384, cited *infra*.

In *Northern Pac. R. Co.* v. *McMullen*, and *Same* v. *Seipp*, 86 Wis., 501, *supra*, the precise question was discussed at length and decided in accordance with our contention.

In those cases, the defendant railroad company filed in the state court its petitions and bonds for removal to the United States court, and made a motion for an order removing the cases. The state court denied the removal, and the defendant thereupon filed the transcript in the Federal court, which, after full consideration, entered an order docketing the cases, and also an order, extending the defendant's time to plead. (See 86 Wis., at 504.)

Subsequently, the defendant company presented to the state court certified copies of the record in the Federal court and objected to the court proceeding with the case.

The state court, however, overruled the objection, and the cases having gone to trial, the plaintiffs obtained judgment, in the state court.

On appeal by the defendants, the Supreme Court of Wisconsin held that the judgments must be reversed, *solely on the ground that the order of the United States court, ordering the cases to be docketed in that court, was conclusive in favor of the right of removal, and that, after that order was entered in the United States court, it was error for the state court to retain jurisdiction of the cases and proceed to trial and judgment.*

The court said:

"The action of the Federal court in taking jurisdiction of these causes on certified copies of the records thereof and proceeding therein, *was brought to the attention of the County Court by affidavit and by a duly certified copy of the record of said court.* * * *

The plaintiff in error not only demanded that the County Court transmit the records and papers to said Federal court upon this showing, but *objected to said County Court entertaining any further jurisdiction of these cases and proceeding to the trial thereof.*

Under such conditions, it cannot be that both the County Court and the Federal Court have concurrent jurisdiction in these cases. The County Court decided that they had not been properly removed, and the Federal Court decided that they had been. The question, then, is, affecting the legal *status* of these cases, which court has the superior and exclusive authority to decide this question? This is peculiarly a *Federal* question, arising under the laws of the United States. *The decision of this question by the Federal court, must, of necessity, be final; and the County Court of Waukesha County, and this court, also must yield to its paramount authority.* It is not possible that there can be any irreconcilable conflict of jurisdiction in such a case. It is necessary to the rights of parties litigant, and to the

peaceful and harmonious administration of justice, that this should be so. THE LAST AND ONLY INQUIRY OF THE STATE COURT SHOULD BE WHETHER THE FEDERAL COURT HAS DECIDED THE QUESTION OF ITS JURISDICTION IN SUCH A CASE. The learned counsel of the defendants in error admit in their brief that the plaintiff in error had the right to remove these suits to the Federal Court by complying with the statutes of the United States, *The Circuit Court of the United States for the Eastern District of Wisconsin had decided that the statutes of the United States had been complied with for their removal to that court; and* THE COUNTY COURT, AFTER THAT, HAD NO RIGHT TO DECIDE OTHERWISE AND RETAIN JURISDICTION OVER THEM.

We express no opinion on the question whether these causes were or were not lawfully removed, or upon the consequences of the mistake or the effect of its correction. THIS COURT HAS NO JURISDICTION TO CORRECT THE ERRORS OF THE CIRCUIT COURT OF THE UNITED STATES, OR TO OVERRULE ITS DECISIONS IN MATTERS CLEARLY WITHIN THE JURISDICTION OF THAT COURT. IT IS SUFFICIENT AND FINAL THAT THAT COURT HAS DECIDED THESE QUESTIONS RELATING TO ITS OWN JURISDICTION OF THESE CASES."

In *Ryan* v. *Matthews*, 64 Iowa, 250, *supra*, the plaintiff applied for and obtained an order of removal to the Circuit Court of the United States. Under the statutes of Iowa, such an order was an appealable order, and the defendant appealed to the State Supreme Court. The appellee made a motion to dismiss this appeal.

In granting the motion to dismiss, the Supreme Court of Iowa said:

"The appellee has filed a motion to dismiss *the appeal, upon the ground that appellant has already submitted the question involved in the appeal to the decision of the Circuit Court of the United States, and the question has been decided against him.* The appellee supports his motion by a certified copy of the record of that court, *showing that the appellant appeared in that court, and*

moved for an order remanding the case, upon the ground that the order of removal was improperly granted, and that the court overruled the motion and retained the case.

In our opinion, the appellee's motion must be sustained.

The appellant HAS SUBMITTED TO THE JURISDICTION OF THE FEDERAL COURT, AND TAKEN A RULING UPON THE VERY QUESTION PRESENTED BY HIM HERE. WE DO NOT THINK THAT HE IS IN A CONDITION TO ASK A RULING HERE IN CONFLICT WITH IT. * * * *The appeal must therefore be dismissed.*"

In *Le Roux et al., relators*, v. *Bay, Circuit Judge*, 46 Mich., 189, *supra*, the proceeding was *mandamus to vacate an order of removal*, entered by the respondent as judge in a certain case pending before him.

In denying this *mandamus*, the Supreme Court of Michigan said:

"*No order of the Circuit Court is necessary to complete the transfer* of a cause from that court to the courts of the United States, after the necessary papers for removal have been filed, and where such an order has been made in the Circuit Court, *the vacating thereof would have no effect upon the cause.* Where a cause has been removed to the United States Court, and the party opposed to such removal wishes to have the cause proceed in the State court, he should make a motion in the United States Court to have the cause remanded, *and if the motion is denied, he has a remedy given him by the Act of Congress, whereby the question can be passed upon by the Supreme Court of the United States, and* AS THE QUESTION INVOLVES THE PROPER CONSTRUCTION OF AN ACT OF CONGRESS, it is eminently proper that the remedy thus provided should be pursued, and not resort to the State court."

And, in *Bodley* v. *National Bank*, 38 Kas., 59, *supra*, the same ruling was made where the motion to remand was sustained.

On appeal to the State Supreme Court, it was assigned as error that the court improperly proceeded with the case, on the ground that it had been properly removed to the United States Court.

In holding that this ground of error could not be sustained, the Supreme Court of Kansas said:

"THIS QUESTION HAS BEEN TRIED AND ADJUDICATED. IT WAS DONE AT THE INSTANCE OF THE PARTIES WHO NOW COMPLAIN.

They took the case to the Circuit Court of the United States, and THE PRECISE QUESTION THEY NOW RAISE WAS THERE DECIDED. *That court was petitioned to pass on the question, and, although excepted to,* ITS JUDGMENT STANDS UNAPPEALED FROM AND UNREVERSED. *Having invoked that jurisdiction and procured a decision in which they have acquiesced, it effectually concludes them, and ends the controversy on that question.*"

See also to the same effect, *Gerner* v. *Mosher*, 78 N. W. Rep., 384, *supra*, decided by the Supreme Court of Nebraska.

It is contended in the brief (pp. 47–51), filed on the motion to dismiss, by counsel for the American Trust and Savings Bank, that the order of the state court denying a removal, was *res adjudicata* and binding on the United States Circuit Court.

This contention is in direct conflict with the decisions of this court, already referred to, *supra*.

See,

Kern v. *Huidekoper*, 103 U. S., 485-490, *supra*.

Marshall v. *Holmes*, 141 U. S., 595, *supra*.

It is also contended in the same brief (p. 47) by the same counsel, that "the order of the Circuit Court was purely interlocutory. *Non constat* but that it has been re-considered and set aside or vacated."

The sufficient answer to this argument is, that the motion to remand, and the order of the United States Circuit Court overruling that motion, are in evidence in the

case and form part of the record. There is no pretense in the record that this order has been set aside, and the presumption, in the absence of evidence to the contrary, is that it has not been.

It might as well be argued that, if a final decree had been set up and proved in the case, this decree should not be considered by the court, for the reason that it does not appear but that the decree has been subsequently set aside by the same court that entered it, or reversed on appeal by a higher court.

It is also contended by counsel for the American Bank (Br., 52, 53) that the right of the Superior Court of Cook County to proceed in this very case, after the entry of the order refusing to remand, was "established" by the decision in *Lake St. R. R. Co.* v. *Farmers' Loan & Trust Co.*, 77 Fed. R., 769.

No such proposition was there decided by the United States Circuit Court of Appeals or was involved in that appeal.

The appeal was from an order entered in the United States Court in this case, after it had been removed to that court, dissolving the *ex parte* injunction which had been issued in the state court.

Counsel for the Lake Street Company were there contending that the lower court had no jurisdiction, as one reason for their further contention that the lower court erred in dissolving the injunction.

And all that the Court of Appeals there held was that, even if counsel were correct in this contention, that would be no reason why the court should reverse the order dissolving the injunction. For, even if such jurisdiction did not exist, the court said that the order appealed from, dissolv-

ing the injunction, "was a nullity," and "there is no necessity that it be reviewed." On the other hand, the court held, that if the Federal jurisdiction existed, there was also clearly no reason why the order dissolving the injunction should be reversed.

Beadleston v. *Harpending*, 32 Fed. R., cited by counsel, proceeded on an erroneous construction of *R. R. Co.* v. *Dunn*, 122 U. S., 513, as was clearly pointed out in *Walker* v. *O'Neill*, 38 Fed. R., 374, to which we refer the court in this connection.

Springer v. *Howes*, 69 Fed. R., 849, cited by counsel, was based on the special facts, viz.: that the defendants had appealed the case to the state Supreme Court on the very question, and the decision of the lower court had been affirmed in that court, on elaborate argument before the transcript was filed in the United States Court.

The only other cases cited by counsel which seem to merit notice are *Drake* v. *Kaiser*, 73 Iowa, 203, and *White* v. *Holt*, 23 W. Va., 792. (Br., 54, 54-57.) It does not appear from the report of these cases that it was set up or shown in either case, that the Federal court had ever entered an order docketing the case, or overruling a motion to remand, or *any other order adjudicating the Federal question.*

The two cases cited are also, in any view, in direct conflict with *Kern* v. *Huidekoper*, 103 U. S., 485, *supra*, and *Marshall* v. *Holmes*, 141 U. S., 495, *supra*.

VI.

THE DECREE OF THE STATE TRIAL COURT, PERPETUALLY ENJOINING THE FURTHER PROSECUTION OF THE FORECLOSURE SUIT PENDING IN THE UNITED STATES COURT, AND OF WHICH THAT COURT HAD ACQUIRED JURISDICTION BEFORE THE FILING OF THE BILL IN THIS CAUSE, WAS ERRONEOUS AND IN VIOLATION OF THE RIGHT OF THE PLAINTIFF IN ERROR, UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, TO BRING AND PROSECUTE THE SUIT IN THE COURTS OF THE UNITED STATES.

In discussing, under Point IV., *supra*, the right of the plaintiff in error to remove the case on the ground that it involves a Federa question, we pointed out that the decree now before this court on writ of error enjoins the prosecution of the foreclosure suit in the United States court. We refer in this connection to what we there said.

Our contention is that this record shows that by the foreclosure suit, the United States court first acquired jurisdiction of the whole subject-matter of the litigation, including the questions raised in the case at bar, and that this jurisdiction was acquired prior to the acquisition of jurisdiction by the state court of the case at bar.

If we are right in this contention, it is manifest that the final decree now before this court was erroneous, because it attempted to enjoin proceedings, over which the United States court had acquired prior jurisdiction.

The material facts on this point are as follows:

The bill for foreclosure set out three defaults in interest,

aggregating about half a million dollars. It alleged that the American Trust and Savings Bank was a co-trustee with plaintiff in error, and had refused to join in filing the foreclosure bill, and that subsequently to the making of the mortgage, the Northwestern Elevated Railroad Company, the West Chicago Street Railroad Company, and the Union Elevated Railroad Company had acquired valuable property rights in the mortgaged property by lease and otherwise, and that the Northern Trust Company held a large number of the bonds, and made all these parties defendants.

The foreclosure bill was filed by plaintiff in error in the Federal court at 10:35 A. M., on January 30, 1896, and within ten minutes thereafter, the summons was issued and delivered to the solicitor for plaintiff in error. (Pr. Rec., 96).

At 11 A. M. on the same day (January 30th) the bill in the case at bar was filed, and ten minutes later the *ex parte* writ of injunction was served on Mr. Burry, as the agent of the plaintiff in error, thereby staying the service of the foreclosure summons. (Pr. Rec., 96).

Afterwards, on the same day, the summons in the case at bar was issued, but it was not served on plaintiff in error until February 6, 1896. (Pr. Rec., 96-97).

It was, however, served on the American Trust and Savings Bank and the Northern Trust Company on February 1, 1896. (Pr. Rec., 31.)

The Northern Trust Company entered its appearance in this case on January 31, 1896, before it had been served with summons, and the American Trust and Savings Bank entered its appearance on February 1, 1896.

On the same day, February 1, the American Trust and

Savings Bank, without waiting to be served with summons, filed a general demurrer in the foreclosure suit in the United States Court. (Pr. Rec., 559, 560.)

No attempt was made to serve the summons in the case at bar on plaintiff in error until February 6, 1896, when a copy of it was delivered to Mr. Burry, as the agent of plaintiff in error, and it was not until March 18, 1896, that the plaintiff in error filed any appearance in the case at bar.

On February 18, 1896, the *subpœna* in the foreclosure suit was served on the Lake Street Company. None of the other defendants to the foreclosure suit were ever served with process, but all entered their appearance on different dates, and on April 22nd, the Lake Street Company filed a general demurrer.

On the above stated facts, we insist that the United States court first acquired jurisdiction. As the bill filed by plaintiff in error in the Federal court was a bill to foreclose the mortgage, every question, which is raised by the allegations of the bill filed in the case at bar, could have been litigated in the foreclosure suit. In the latter suit, the question of the right of plaintiff in error to act as trustee, notwithstanding its failure to comply with the Illinois statute requiring the deposit, was directly involved, and, if it had no such right, that fact, as well as the other facts alleged against it, could have been set up as a defense to the foreclosure proceeding, and a cross-bill, containing every one of the allegations which are contained in the bill in the present case, could have been filed for its removal as trustee.

It is manifest, therefore, that the subject-matter of the foreclosure bill was broad enough to cover the subject-matter of the bill in the case at bar.

This being so, we insist:

(1) That as the foreclosure suit was substantially a proceeding *in rem*, complete jurisdiction of the subject-matter was acquired by the Federal court by the filing of the foreclosure bill, followed as it immediately was by the issue of the *subpœna* without regard to the time when the *subpœna* was served, or any of the defendants entered their appearance.

(2) But further, we contend that even if the prior filing of the bill and the prior issue of the *subpœna* did not give the United States Circuit Court prior jurisdiction, nevertheless the filing in the United States court of the demurrer of the American Trust and Savings Bank, one of the principal defendants to the foreclosure bill, gave the United States court complete jurisdiction of the foreclosure case.

(3) Inasmuch as the service of the *subpœna* in the Federal court was stayed by the *ex parte* injunction of the state court, no advantage in service of process could, on that account, be acquired in favor of the jurisdiction of the state court.

Under these circumstances, the final decree entered in the state court was clearly an unwarranted interference with the jurisdiction of the Federal court. If such jurisdiction is conceded to the state courts, they can, if so inclined, forbid any person from carrying on any litigation in the Federal courts, and block all the jurisdiction and process of those courts. The final decree in this case asserts such jurisdiction. This constitutes reversible error.

In *Riggs* v. *Johnson County*, 6 Wall., 196, this court said:

"Undoubtedly circuit courts and state courts, in certain controversies between citizens of different states, are courts of concurrent and co-ordinate jurisdiction, and the general rule is, that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court."

In *Logan* v. *Lucas*, 59 Ill., 238, the court said:

"It is a well recognized doctrine that the state courts cannot enjoin proceeding in the courts of the United States, nor the latter in the former courts. 2 Story's Eq. Ju., Sec. 900; *Munson* v. *Harroun*, 34 Ill., 422."

See, also,

Heidritter v. *E. O. C. Co.*, 112 U. S., 305.
Mail v. *Maxwell*, 107 Ill., 561.
Mann v. *Pigott*, 11 Ill., 88.

This rule is so well established that it is unnecessary to make further quotations.

We, therefore, insist that the state court erred in its final decree in perpetually enjoining the proceedings in the Federal court, and that the final decree should, for that error, be reversed.

HERBERT B. TURNER,
WILLIAM BURRY,
JOHN J. HERRICK,
Solicitors for Plaintiff in Error.